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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 10, Original.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG,
PETITIONER.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI AND MOTION FOR LEAVE TO FILE SAME.

THOMAS D. O'BRIEN,
GEORGE T. SIMPSON,
CHARLES S. JELLY,
ROYAL A. STONE,
Solicitors for Petitioner.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28397

Supreme Court of the United States.

In re EDWARD T. YOUNG, Petitioner.

Motion.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Thomas D. O'Brien, George T. Simpson, Charles S. Jelley and Royal A. Stone, of Counsel for Edward T. Young, the Petitioner above named, and move this Honorable Court for leave to file the petition, herewith exhibited, of the said Edward T. Young, for a Writ of *Habeas Corpus* and a Writ of Certiorari.

THOMAS D. O'BRIEN.
GEORGE T. SIMPSON.
CHARLES S. JELLEY.
ROYAL A. STONE.

Supreme Court of the United States.

In re EDWARD T. YOUNG, Petitioner.

Petition.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your pet-tioner Edward T. Young, a citizen of the United States and of the State of Minnesota and a resident of said State, respectfully shows, that he is now unlawfully and unjustly held in custody, detained and restrained of his liberty by William L. Grimshaw, United States Marshal for the District of Minnesota at the City of St. Paul in the County of Ramsey in said State, and that the circumstances of the said unjust and wrongful detention and restraint of your petitioner are as follows, to-wit:

I.

Your petitioner states that on May 31st. 1907, one Charles E. Perkins a citizen and resident of the State of Iowa, and one David C. Shepard a citizen and resident of the State of Minnesota, as complainants, filed their bill of complaint in the Circuit Court of the United States for the District of Minnesota, Third Division, against the Northern Pacific Railway Company, a railroad corporation organized and existing under the laws of the State of Wisconsin, Edward T. Young your Petitioner, Ira B. Mills, Charles F. Staples, William E. Young, E. A. Ewert, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, as de-

fendants, and that a duly verified and authenticated copy of the said bill of complaint and of the record of the proceedings in the suit thereby instituted, in so far as the same concern your petitioner, (but not including any evidence produced at the hearing herein mentioned) is hereto attached and marked Exhibit "A," and is hereby referred to and made a part hereof.

II.

That during all the times herein mentioned, and since the first Monday in January 1905, your petitioner has been and now is, the duly elected, qualified and acting Attorney General of the State of Minnesota, and that, as will appear from the said bill of complaint, he was not therein and thereby sued as an individual but as and only as the Attorney General of the State of Minnesota, and the relief prayed for against your petitioner was, that as Attorney General aforesaid, he be enjoined temporarily and permanently from any attempt to compel the defendant railway company to observe, publish, post or put in force certain rates and charges fixed and established by two certain orders of the Railroad and Warehouse Commission of the State of Minnesota and by two certain acts of the legislature of that State and that your petitioner be further enjoined from taking any action, step or proceeding against said Railway Company or any of its officers, directors, agents or employés to enforce any penalties or remedies for a violation of said orders or acts or either of them, all of which more fully appears from the copy of said bill of complaint hereto attached and to which for greater certainty reference is hereby made.

III.

That at the time of exhibiting said bill of complaint all of the rates and charges fixed by said orders of the said Commission and by the Legislative Acts had been put into effect and were then and still are maintained by said railway company, except the rates and charges fixed and required in and by that certain act of the legislature of the State of Minnesota approved April 18, 1907 being Chapter 232 of the session laws of the State of Minnesota for the year 1907 and being the act of the legislature of Minnesota a copy of which is attached to said bill of complaint as exhibit four thereof. Said Chapter 232 prescribed certain rates to be maintained by common carriers in Minnesota for the transportation between stations in Minnesota of certain specified commodities from and after June 1st. 1907: That said Chapter 232 imposes no special or ministerial duty upon your petitioner and his duties as Attorney General in connection with said law are purely discretionary and executive.

That the order for and the temporary injunction made and issued by the Honorable The Circuit Court as hereinafter set forth refers only to the compliance with and enforcement of said Chapter 232 Laws 1907.

IV.

That on May 31st. 1907, upon the filing and exhibiting of the said bill of complaint the Hon. William Lochren, sitting as Circuit

Judge of the Circuit Court of the United States for the district of Minnesota in the third division thereof issued the rule and order appearing in Exhibit "A" hereto attached, wherein and whereby it was amongst other things ordered as to your petitioner, as follows:

"That in the meantime and until the further order of the court in the premises, said defendant Edward T. Young, Attorney General of the State of Minnesota, is hereby restrained from taking or causing to be taken, any action, step or proceeding against said Railway Company, its officers, directors, agents or employés, to enforce the penalties and remedies specified in said act approved April 18th, 1907."

That also upon the filing and exhibiting of the said bill there was issued out of the said Circuit Court, a subpœna directed to your petitioner and the other defendants, directing him and them to appear and make answer to the said bill of complaint, a copy of said subpœna being found in Exhibit "A" hereto attached.

V.

That thereafter, appearing specially and only for the purpose of the same, your petitioner duly moved the said Circuit Court for a dismissal of the said action as to him, a copy of said motion for dismissal appearing in Exhibit "A" hereto attached, the ground of said motion being as follows, to-wit:

"That it appears by the said bill that the same is exhibited by the complainants against this defendant as, and only as, the Attorney General of the State of Minnesota, and that the relief sought and prayed for therein is the restraint of him, the said Edward T. Young, as Attorney General aforesaid, by writ of injunction from proceeding in his official capacity, and not otherwise, and in the exercise of an executive discretion thereby vested in him, to commence the appropriate action or actions in the name of and on behalf of the said State of Minnesota, thereby restraining the State of Minnesota from proceeding by appropriate action or actions to enforce certain of its laws or to test the validity of the said laws; the said suit being, therefore, in truth and effect a suit against the said State of Minnesota, as a party defendant, commenced against it without its consent, contrary to the Eleventh Amendment of the Constitution of the United States."

VI.

That in and by the restraining order above referred to your petitioner was directed to show cause on June 12th, 1907, why a temporary injunction should not issue against him in accordance with the prayer in said bill of complaint contained: That the said matter having been duly adjourned to July 16th, 1907, and said restraining order in the meantime having been continued in force, your petitioner, appearing specially and only in response to the said restraining order and order to show cause, respectfully urged upon the said Circuit Court that the said restraining order ought to be discharged and that no temporary injunction ought to be granted as to him, upon the grounds stated in the motion last above referred to for the dismissal of the said action, a copy of your petitioner's show-

ing why such temporary injunction should not issue appearing in Exhibit "A" hereto attached.

VII.

That on said July 16th, 1907, your petitioner's said motion to dismiss the said bill of complaint as to him was denied by the said Circuit Court, as will appear from the copy of the record of its proceedings in the premises, appearing in Exhibit "A" thereto attached, but that no temporary injunction was then issued because of the adjournment of the entire matter to September 3rd, 1907, said restraining order being continued in force until said date.

VIII.

That thereafter the said bill of complaint was amended by an order of the court, as will appear from the copy of said order and the amendments made pursuant thereto appearing in Exhibit "A" hereto attached, and your petitioner, his motion to dismiss made under his special appearance aforesaid having been denied, thereupon demurred to the said bill of complaint, a copy of said demurrer appearing in Exhibit "A" hereto attached. That among the grounds for the said demurrer was the ground set forth in your petitioner's aforesaid motion to dismiss the said action, and in his showing of cause why a temporary injunction should not be issued as to him.

IX.

That thereafter, the matter having been fully argued and duly presented to the court, your petitioner's said demurrer was overruled, a copy of the order overruling the same appearing in Exhibit "A" hereto attached, and thereafter the said Circuit Court on September 23rd, 1907, made and entered its order for a temporary injunction as prayed for, a copy of the said order and of the temporary injunction issued pursuant thereto appearing in Exhibit "A" hereto attached.

X.

That thereafter and on the 24th day of September 1907 your petitioner as Attorney General of Minnesota caused to be instituted an action in the nature of a proceeding in Mandamus wherein the State of Minnesota on the relation of your petitioner was complainant and said Northern Pacific Railway Company was respondent, which said action was brought in the District Court of the second Judicial district of the State of Minnesota in and for the County of Ramsey, a court of general jurisdiction both at law and in equity.

The relief sought in said action was that the said Northern Pacific Railway Company be compelled to comply with the provisions of said Chapter 232 Laws 1907 and publish, put into effect and maintain the rates and charges specified in said act of the legislature, copies of said petition and of the alternative writ of Mandamus issued thereon are included in Exhibit "B" hereto attached.

On the 11th day of October 1907 a rule and order was made by Honorable William Lochren sitting as Judge of said Circuit Court of the United States for the district of Minnesota, commanding your

petitioner to show cause on the 21st day of October why he should not be punished for contempt of said circuit court because of his action in instituting said mandamus proceedings.

That your petitioner appeared at the time and place fixed by said order and duly filed his answer and return thereto and thereupon and on said October 21st said court after hearing the parties to said proceedings made and entered its order adjudging your petitioner guilty of contempt and directing that he be punished as in said order provided.

That duly anthenticated copies of said order to show cause, your petitioners return thereto and the order of said circuit court adjudging your petitioner guilty of contempt are hereto attached, marked Exhibit "B" and are hereby referred to for greater certainty.

That your petitioner's office as Attorney General of the State of Minnesota is established and provided for by the Constitution of the said State, Section 1 of Article V thereof providing as follows, to-wit:

"The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer and Attorney General, who shall be chosen by the electors of the State."

That neither by statute, nor otherwise is your petitioner charged with any special duty of a ministerial character in the doing or not doing of which said complainants in the said bill of complaint or the said Northern Pacific Railway Company had any legal right, and that whatever duties your petitioner had or has with respect to the several matters complained of in the said bill of complaint, are of an executive and discretionary nature. That in no case could your petitioner, even though it was his intention so to do, which it was not, deprive the said complainants or the said Northern Pacific Railway Company, or either of them, of any property, nor could he trespass upon their rights in any particular, and that all he could do as Attorney General as aforesaid and all that it was his duty to do in that capacity, and all that he intended to do or would do, was to commence formal judicial proceedings in the appropriate Court of Minnesota against the said Northern Pacific Railway Company, its officers, agents and employés to compel the said Company, its officers, agents and servants, to adopt and put in force the schedule of freight rates, tariffs and charges prescribed by said Chapter 232 Laws 1907 of the State of Minnesota.

That by reason of the premises the said suit instituted by the said Perkins and Shepard, in so far as the same is against your petitioner, is a suit against the State of Minnesota, for that the restraint of your petitioner in the manner aforesaid and the prevention of his commencing the proposed action in the name of the State of Minnesota, is the restraint and prevention of the said State of Minnesota itself, and that the said restraining order and the said temporary injunction operate immediately and effectively against the said State of Minnesota, and that the said suit is one against the said State in violation of the 11th Amendment to the Constitution of the United States, and that therefore the same is and was so far as your petition- is concerned beyond the jurisdiction of the said Circuit Court; that all of the proceedings therein, and especially the

attachment for contempt the fine thereupon imposed and the judgment of commitment pending the payment of said fine, whereby and whereunder your petitioner is now unjustly and unlawfully in custody detained and restrained of his liberty, is and was beyond the jurisdiction of the said Circuit Court and entirely void, and your petitioner should forthwith be relieved therefrom and from all thereof, and be restored to his liberty.

Wherefore, your petitioner prays that a Writ of *Habeas Corpus* may be issued out of and under the seal of this Honorable Court, to be directed to the said William L. Grimshaw, United States Marshal for the District of Minnesota aforesaid, commanding him to have the body of your petitioner, together with return of the date and cause of his detention, before this Honorable Court on a day to be designated therein, and that a Writ of Certiorari issue directed to the said United States Circuit Court for the District of Minnesota, Third Division, commanding it to certify and send to this Court on a certain day to be therein designated, a full and complete transcript of the process, record and proceedings by and before it had touching the matter of your petitioner's said arrest and detention, and that your petitioner, may have such other or further full and complete relief in the premises as to this Honorable Court may seem appropriate, and that he may be discharged from said custody and imprisonment, and your petitioner will ever pray.

EDWARD T. YOUNG, *Petitioner.*

THOMAS D. O'BRIEN,
GEORGE T. SIMPSON,
CHARLES S. JELLEY,
ROYAL A. STONE,
Counsel for Petitioner.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Edward T. Young, upon oath, say that I am the petitioner named in and who signed the foregoing petition and know the contents thereof and that the statements therein contained are true.

EDWARD T. YOUNG.

Subscribed and sworn to before me this 21st day of October, 1907.

[Notarial Seal, Hennepin Co., Minn.]

C. LOUIS WEEKS,
Notary Public, Hennepin County, Minnesota.

My commission expires May 17th, 1912.

EXHIBIT "A."

United States Circuit Court, District of Minnesota, Third Division.

CHARLES E. PERKINS ET AL., Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL., Defendants.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Bill of Complaint.

How, Butler & Mitchell, Edward S. Robert, Solicitors for Complainants.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Minnesota:

Your orators, Charles E. Perkins, a citizen of the State of Iowa, and a resident therein, and David C. Shepard, a citizen of the State of Minnesota and a resident of the County of Ramsey therein, bring this their bill of complaint against Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, and having its principal place of business in the City of St. Paul, in the State of Minnesota, Edward T. Young, a citizen of the State of Minnesota, and a resident of the County of Ramsey therein, Ira B. Mills, Charles F. Staples and William E. Young, who are each of them citizens of the State of Minnesota and residents, respectively, of the Counties of Clay, Dakota and Blue Earth therein, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, who

are each of them residents of the State of Minnesota, said Evarts, Whiteman and Reeve being residents, respectively, of the Counties of Ottertail, Sherburne and Stevens therein, and said Michauds being each of them a resident of the County of Ramsey therein, and thereupon your orators aver:

I.

The defendant Northern Pacific Railway Company is a railroad corporation and a common carrier of goods and passengers engaged in state and interstate commerce, and owning, maintaining and operating lines of railway in the State of Minnesota and other states. The main line of said Northern Pacific Railway Company extends from the City of Superior, in the State of Wisconsin, and the Cities of Duluth, St. Paul and Minneapolis, in the State of Minnesota, in a westerly direction through the States of Minnesota, North Dakota, Montana, Idaho, Washington and Oregon to the Cities of Seattle, Tacoma and Portland, on the Pacific Coast. Its system of railroads, including its said main line and its branches, comprises about fifty-five hundred (5,500) miles. The whole of its railroads constitute and have constituted one system, and have been and are operated as such. The stock and bonds of the company outstanding represent the whole system. It is impossible to segregate its stock or bonds so as to say that any part of them or of either of them stand for or represent its railroad in any state. Its cars, engines, supplies and appliances are, for the most part, used upon the system wherever required. It is impossible to operate the said railroads separately in any state, and, for the most part, the trains of the said company necessarily move between different states, the same train and cars carrying both interstate freight and passengers and freight and passengers locally within each of said states. The principal business of said company consists of interstate commerce, and it is a carrier in such commerce, subject, as your orators are advised and believe, to the sole supervision and control of the United States.

II.

The defendant Edward T. Young is the Attorney General of the State of Minnesota.

The defendants Ira B. Mills, Charles F. Staples and William E. Young are the members of and constitute the Railroad and Warehouse Commission, duly elected and acting as such under the General Statutes of said state.

The defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud are hereby designated as shippers, each being a person engaged within the State of Minnesota in shipping freight over, and in receiving freight shipped over, the lines of said Railway Company within the State of Minnesota. These last named defendants represent a class of shippers so numerous that it is impossible to attempt to join them all as parties hereto; and said defendants are made parties hereto for the purpose of determining the rights as against the said Railway Company of all shippers under the Acts and Orders, respectively, hereinafter set forth.

III.

This is a suit in equity arising under the Constitution of the United States for that your orators seek to enjoin said defendant Northern Pacific Railway Company from publishing or adopting or continuing to observe or keep in force, if the same have been publish-d or adopted, certain rates, tariffs and charges prescribed or set forth in two certain Acts of the Legislature of the State of Minnesota, and two certain Orders of the Railroad and Warehouse Commis-ion of said state hereinafter specifically described, and to enjoin the other defendants herein, and each thereof, from attempting in any manner to enforce the provisions of said Acts or Orders, or either thereof, or from instituting any action or proceeding against said defendant Railway Company, its officers, directors, agents or employés on account of any violation thereof, for the reason that the said Acts and Orders, and each of them, and all the tariffs, rates, charges, regulations, schedules and classifications therein assumed to be prescribed, and each of them, are violative of the Constitution of the United States. The matter in dispute in this suit exceeds, exclusive of interest and costs, the sum of two thousand dollars.

IV.

On the 6th day of September, 1906, the Railroad and Warehouse Commission of the State of Minnesota, assuming to act under and by virtue of the provisions of the statutes of said state, made and published, and thereafter duly served an order entitled "In the Matter of the Investigation of the Reasonableness of the Merchandise and Commodity Tariffs of Rates and Charges between Stations in the State of Minnesota on the Several Lines of Railroad," a copy of which Order is hereto annexed, marked "Exhibit 1," and is hereby made a part hereof; and on the 3d day of May, 1907, likewise made and published its certain order, a copy of which is hereto annexed, marked "Exhibit 2."

The tariff of said defendant Railway Company prior to the promulgation of said Orders and the reduction therein as affected by said Orders, are shown in Exhibit 3, hereto attached and hereby made a part hereof.

V.

The legislature of the State of Minnesota, at its session of 1907, passed an Act which was approved on the 18th day of April, 1907, and is entitled "An Act Relating to Railroad Freight Rates in the State of Minnesota, and Defining Certain duties of the Railroad and Warehouse Commission." A copy of such Act is hereto annexed, marked "Exhibit 4," and is hereby made a part hereof.

The rates of said defendant Railway Company which will be affected by said Act and the tariff as fixed in said Act, are shown in Exhibit 5, attached hereto and hereby made a part hereof.

VI.

At the same session said legislature of the State of Minnesota passed an Act, which was approved on the 4th day of April, 1907,

and is entitled "An Act Prescribing the Maximum Rate to be Charged for the Transportation of Passengers Upon Railroads Within the State of Minnesota, Providing for the Enforcement of the Same and Penalties for the Violation Thereof." A copy of such Act is hereto annexed, marked "Exhibit 6," and is hereby made a part hereof. Prior to the taking effect of said Act, said defendant Railway Company was charging a rate of three cents per mile for passengers over twelve years of age, and two cents per mile for passengers under twelve years of age.

VII.

Said defendant Northern Pacific Railway Company has published and put into effect, and now keeps and maintains in effect, the rates prescribed in said Order of September 6, 1906, and in said Act approved April 4, 1907, and threatens to publish and put into effect the rates prescribed in said Order of May 3, 1907, and said Act approved April 18, 1907, when said Act and Order shall become effective by virtue of the terms thereof.

VIII.

Upon the railroads of said Northern Pacific Railway Company are two large grain fields, one comprising the western portion of the State of Minnesota, the State of North Dakota and eastern portion of the State of Montana, the other comprising the eastern portion of the State of Washington and a portion of northern Idaho.

From the Minesota-North Dakota-Montana field all the grain moves to the head of Lake Superior or to Minneapolis. From the Washington-Idaho field it moves principally to Puget Sound or to Portland.

Between the eastern termini of the lines of said Railway Company and Montana the coal shipped by said Railway Company comes entirely, or substantially entirely, from the head of Lake Superior, and is delivered at all stations upon the lines of said Railway Company through Minnesota and North Dakota.

The cattle, sheep and hogs shipped over the lines of said Railway Company are produced in the whole region tributary to such lines in the States of Minnesota, North Dakota and Montana, and, when shipped, are substantially all shipped to the same market, viz., St. Paul, or points beyond.

Lumber carried by said Railway Company is produced in one of three districts: First, Minnesota; second, Montana and Idaho; third, Washington. The Minnesota lumber is carried by said Railway Company to various points in Minnesota, Wisconsin and North Dakota. The main shipment of the western lumber is from the point of production thereof to the eastern terminals of the lines of said Railway Company.

The conditions attending the transportation of wheat are substantially the same, whether the wheat is shipped from North Dakota stations or from Minnesota stations.

The conditions attending the transportation of coal are substan-

tially the same whether the coal is shipped to Minnesota stations or to the North Dakota stations.

The conditions attending the transportation of live stock are substantially the same whether the shipment originates in Minnesota, North Dakota or Montana.

The conditions attending the transportation of Minnesota lumber are substantially the same regardless of whether the same is shipped to points within or without the state.

The conditions attending the transportation of merchandise are the same upon said Railway Company's lines in Wisconsin, Minnesota and North Dakota; and the merchandise shipped to points in those states is shipped from the same points of origin.

The conditions attending the transportation of passengers are the same in all said states, and, for the most part, whether such transportation is wholly within a state or interstate.

It is the duty of said Railway Company to serve all the localities above mentioned, and all the communities therein, without discrimination.

Therefore, in view of its legal obligation not to discriminate it has always been the practice of said Railway Company to make its tariffs on merchandise, on grain and other products of the soil, on live stock and on lumber in the territory above referred to, and, for many years, its rates for passenger transportation, upon a uniform principle or basis, disregarding state lines. Its respective rates on merchandise, on grain and similar products, on coal, on live stock and on lumber, and during many years for passengers, are and have been the same for similar distances upon local shipments within either Wisconsin, Minnesota or North Dakota, and upon interstate shipments within that territory.

Considering the conditions above described, it is and has been utterly impossible to apply in either of said states a materially different plan, system or scale of tariffs upon passengers or upon merchandise or said commodities or a materially lower plan, system or scale of such tariffs upon local shipments within any of said states from those applied upon interstate shipments.

IX.

The tariffs of said Railway Company in force prior to September 6, 1906, and May 3, 1907, and affected by the Orders of said Railroad and Warehouse Commission under those dates, and the tariffs of said Railway Company in force prior to May 1, 1907, and affected by said Act of the legislature of the State of Minnesota, approved April 4, 1907, to take effect on said May 1, 1907, and all other tariffs of said Railway Company, were and are reasonable and fair as between different states, and when applied locally within states, were and are reasonable and fair as compared within the interstate tariffs.

The tariffs prescribed by said Order of the Railroad and Warehouse Commission, under date September 6, 1906, and those prescribed by said Act of the legislature of the State of Minnesota, approved April 18, 1907, are constructed upon the principle of a charge

for terminal service plus a per mile charge for hauling service, the hauling service charge per mile being materially higher for short distances than for long; and, after a distance is reached of from two hundred to three hundred miles, the tariff is made upon the principle of adding a constant and very small hauling charge for additional distances. The principle or ratio of increase for additional distances above two hundred miles as prescribed in said Order and said Act, respectively, is so small as not to furnish sufficient revenue to pay the actual cost of hauling such additional distance, and is, therefore, unreasonable and confiscatory.

The roads of said Railway Company are well and judiciously located, and were built in obedience to public necessity, and are properly equipped and built, having reference to the business of the country, and that reasonably to be expected, and are well and economically operated. Its property represents an actual and fair value of not less than $350,000,000, and it could not, as your orators believe, be reproduced for that sum.

This paragraph appears in original bill at the end of X.

X.

Between the distances of two hundred and fifty miles and three hundred and twenty miles from eastern terminals said Railway Company has many stations in the State of Minnesota, and also in the State of North Dakota, the stations in each state producing substantially the same commodities principally, *i. e.*, wheat and other grains, and cattle and other live stock, and consuming substantially the same products, including lumber and coal.

Your orators know of no principle upon which said Railway Company can legally apply to these stations beyond the Minnesota state line a materially higher scale of rates, whether for passengers or for freight, than it applies to stations within the State of Minnesota.

As applied to said Railway Company, having regard to the conditions above described, said Orders and said respective Acts operate directly and necessarily upon interstate commerce, and are regulations of such commerce in violation of the exclusive power granted to congress by the Constitution of the United States.

If the States of Wisconsin, North Dakota, Montana, Idaho, Washington and Oregon, through which the main line of said Railway Company passes, should each of them establish rates like those established by said Orders and said respective Acts, the result would be that the interstate rate which might be charged by said Railway Company for transportation of passengers or freight, as the case might be, could not in practice be greater than the sum of the respective local rates, and, therefore, such interstate rate would be wholly established and governed by the rates so established by such respective states, and not by the laws of the United States; and,

moreover, such interstate rate so established would be wholly non-compensatory to said Railway Company, and confiscatory, with the result that said Railway Company would be deprived of its property without due process of law, in violation of the Constitution of the United States.

Your orators are advised and believe that the passenger tariffs charged by said Railway Company prior to the first day of May, 1907, upon which date said Act of April 4, 1907, by its terms took effect, for transportation within the state of Minnesota, were reasonable and low. Such rates have for a long time past been low, and have not yielded a fair and reasonable return upon the investment in said lines of railway and the equipment necessary to perform the service of such transportation. Such rates for local transportation of passengers within the State of Minnesota have not been high when compared with the rates maintained and charged by said company in other states through which its lines of railway run, but have been equal thereto, and the same have not been unreasonably high as compared with the rates charged by said Railway Company for its interstate transportation of passengers.

The cost and expense of transporting passengers between stations in said State of Minnesota is far greater per mile than the cost and expense of interstate traffic which moves for longer distances. The cost and expense incident to the transportation of passengers within the State of Minnesota has largely increased during recent years. Salaries and wages of employés have been largely increased from year to year, and the cost of all materials used in the maintenance and repair of the lines of said Railway Company has increased within the last few years, and particularly within the past year, more than twenty-five (25) per cent. The passenger rate prescribed by said Act of April 4, 1907, will not, if the same be enforced in current and future years, afford said Railway Company a sufficient revenue to pay the cost of transacting such passenger business upon its lines within the State of Minnesota, and will not, if the same be enforced, yield any return whatever upon the investment of said Railway Company in its properties, or the reasonable value thereof, and will, therefore, be not only non-compensatory but also confiscatory, and will deprive said Railway Company of its property without due process of law, in violation of the Constitution of the United States.

While the immediate effect of said Orders and of said Act, approved April 18, 1907, if it could be confined to the State of Minnesota, might not be to take the property of said Railway Company without due process of law, yet if the principle upon which the tariffs are made, as above described, should be applied to the long haul interstate business of said company, and if the percentages of reduction effected by the said Orders and said Act should be applied to said company's local business in other states (which is now being transacted upon rates fair and equal by comparison with said company's Minnesota rates prior to said Orders and said Act), they would operate to confiscate the railroad of said company, and to deprive it of property without due process of law, in violation of the

Constitution of the United States, because such measure of reduction would leave said company without any net earnings whatever from its property.

XI.

Your orators are now, and for more than two years last past continually have been shareholders in the said Northern Pacific Railway Company, each owning over two hundred (200) shares therein, which are worth and of the value of more than one hundred dollars ($100.00) per share; and they bring this bill in their own behalf, and in behalf of all other stockholders in said Railway Company similarly situated who may join therein. Prior to the institution of this suit, and after the passage of said Acts, your orators demanded of the president and managing directors of the said Northern Pacific Railway Company that they cease obedience to said order of said commission, and that said rates, as set forth in said passenger and freight bills, respectively, should not be put into effect, and that said corporation, its officers and directors, institute proper suit or suits to prevent said rates from continuing or becoming effective, as the case may be, and to have the same declared illegal; and that the said corporation, its president and directors, have positively declined and refused so to do. This suit is not in any manner or to any extent a collusive one, to confer on the Court of the United States jurisdiction of a case of which it could not otherwise have cognizance.

XII.

Every freight shipment which said Orders or said Act of April 18, 1907, seek to affect, and every passenger carried by said Railway Company may, if said Railway Company shall fail to continue to observe and keep in force or to observe and put in force the same, as the case may be, result in an action against said company or a criminal proceeding against its officers, directors, agents or employés; and it will result in an endless number of actions at law and criminal proceedings.

If said Railway Company, its officers, directors, agents and employés shall cease obedience to the said Order of the said Railroad and Warehouse Commission of September 6, 1906, or shall refuse obedience to said Order of May 3, 1907, said commission and said Edward T. Young, as Attorney General of the State of Minnesota, in behalf of said commission, will, as your orators are advised and believe, institute proceedings by mandamus, or otherwise, against said Railway Company, its officers, directors, agents or employés, to enforce said Orders and all the provisions thereof, and threaten to and will take other proceedings against said company, its officers, directors, agents and employés, to the same end and for the same purpose.

If said Railway Company, its officers, directors, agents and employés shall fail or refuse to keep in force the tariff prescribed by the said Act of April 4, 1907, or fail or refuse to put in force and effect the tariffs prescribed by said Act of April 18, 1907, said defendant Edward T. Young will, as your orators are advised and be-

lieve, institute mandamus or other proceedings for the purpose of enforcing said Acts, and each thereof, and the provisions and penalties thereof.

In consideration whereof, and forasmuch as your orators are remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity, where matters of this kind are properly cognizable and relievable, your orators pray that said Acts of the legislature of the State of Minnesota, and each of them, and said Orders of said Railroad and Warehouse Commission, and each of them, be declared to be in violation of the Constitution of the United States, and therefore void and of no effect, so far as the said Northern Pacific Railway Company, its officers, directors, agents and employés, are concerned, and that said Northern Pacific Railway Company, its officers, directors, agents and employés, be temporarily and permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by said Order of September 6, 1906, or the passenger rate set forth and prescribed in said Act of April 4, 1907, or from publishing or adopting the tariffs set forth in said Act of April 18, 1907, or those set forth in said Order of May 3, 1907, or from reducing its tariffs to the figures set forth in said last named Act, or said last named Order.

That the said Edward T. Young, as Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and William E. Young, as the Railroad and Warehouse Commission of the State of Minnesota, be temporarily and permanently restrained and enjoined from any attempt to compel said Railway Company to observe, publish, post, or put in force said rates, or any of them, as fixed by said Order of September 6, 1906, or said Order of May 3, 1907, and further be temporarily and permanently restrained and enjoined from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employés, to enforce any penalties or remedies for the violation by said Railway Company of said Orders of either of them.

That said Edward T. Young, as Attorney General, be temporarily and permanently enjoined and restrained from taking any action, step or proceeding against said Railway Company, its officers, agents or employés, to enforce the penalties and remedies specified in said Acts of April 4, 1907, and April 18, 1907, or either of them.

And that the defendants, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and other shippers affected by this proceeding, be temporarily and permanently enjoined and restrained from instituting any action for the violation of said Orders or Acts, or either of them, or from demanding that any of the rates contained therein, or either of them, be given to said shippers, or any of them; and that your orators may have such other and further relief as may be just and equitable.

And may it please your honors to grant unto your orators a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Northern Pacific Railway Company, Edward T. Young, Ira B. Mills, Charles F.

Staples, William E. Young, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, commanding them, and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer, but not under oath (answer under oath being expressly waived) all and singular the premises, and to stand to and perform and abide by such order, direction and decree as may be made against them in the premises; and that, pending the final hearing of this cause, a temporary restraining order may be issued as above prayed, and your orators will ever pray, etc.

CHARLES E. PERKINS,
DAVID C. SHEPARD,
By JARED HOW, *Their Solicitor.*

HOW, BUTLER & MITCHELL,
EDWARD S. ROBERT,
Solicitors for Complainants.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, David C. Shepard, upon oath, say that I am one of the complainants in the above entitled bill, which I have read. I know the contents thereof, and the same are true of my own knowledge, except as to matters therein stated upon information and belief, and as to those matters I believe them to be true.

DAVID C. SHEPARD.

Subscribed and sworn to before me this 29th day of May, 1907.

KENNETH G. BRILL,
[SEAL.] *Notary Public, Ramsey County, Minn.*

My commission expires Jan. 20, 1913.

EXHIBIT I.

Before the Railroad and Warehouse Commission of the State of Minnesota.

In the Matter of the Investigation of the Reasonableness of the Merchandise and Commodity Tariffs of Rates and Charges Between Stations in the State of Minnesota, on the Several Lines of Railroad.

In the above entitled matter, the Commission having hear- the evidence, finds as facts in relation to the merchandise rates on the line of the Northern Pacific Railway Company.

First. That the Northern Pacific Railway Company is a corporation, organized and incorporated under the laws of the State of Wisconsin, and is operating a railroad through various parts of the State of Minnesota, and carries freight and passengers for hire.

Second. That the terminal and distance freight rates on merchandise now charged by the Northern Pacific Railway Company on classes 1, 2, 3, 4, 5, "A," "B," "C," "D," and "E," as shown by the so-called "Western Classification," between stations in the State of Minnesota, are unreasonable.

Third. That the merchandise rates on classes 1, 2, 3, 4, 5, "A," "B," "C," "D" and "E," as shown in exhibit "A," hereto attached and made a part of this order (according to said Western Classification, with exceptions and changes made by the Minnesota Commission), are reasonable maximum rates between all stations on the line of the Northern Pacific Railway Company in the State of Minnesota, and what are known as terminal or distributing stations on said railway in said state, and that a rate five cents higher than the rate shown in exhibit "A" is a reasonable maximum rate between stations on the line of said railway in this state, neither of which is a terminal or distributing station.

It is therefore ordered, that the reasonable maximum rates on said classes 1, 2, 3, 4, 5, "A," "B," "C," "D" and "E" are reduced and fixed at the rates shown in said exhibit "A" between all stations on the line of said railway in the State of Minnesota, and what are now known as terminal and distributing stations on said railway in said state, to-wit: Minneapolis, St. Paul, Duluth, Stillwater, St. Cloud, Brainerd, Fergus Falls, Moorhead, Crookston, Sauk Center, Detroit, and such other stations as may hereafter be made terminal or distributing stations, and the Northern Pacific Railway Company is hereby forbidden to charge any higher rate than that named in said Exhibit "A." This order does not prevent the charging of a lower rate than that provided by exhibit "A," but in case a less rate is charged on one class, all classes must be reduced so as to preserve the relative relations between classes fixed in exhibit "A."

Until the further order of the Commission, said Railway Company may charge a rate five per cent. more than shown in exhibit "A" for shipments between stations, neither of which is a terminal or distributing station.

This order shall be in force thirty days after its service.

Dated St. Paul, Minn., September 6th, 1906.

By the Commission,

A. O. CLAUSEN, *Secretary.*

Note.

1. The matter of joint rates will be the subject of a future order when the necessity for the same is presented.

2. When issuing a schedule of rates, the fraction of a cent, 1 to 24 one-hundredths may be dropped; 25 to 75 one-hundredths may be called one-half cent, and 76 to 99 one-hundredths may be called one cent.

3. In case the Railway Company, in putting in a new schedule of rates, fails to so adjust the "in" rates as to protect the jobbers at the distributing stations other than St. Paul, Minneapolis and Duluth, the Commission will undertake to make the necessary adjustment.

"EXHIBIT A."

St. Paul, Minnesota, September 7, 1906.

Railroad and Warehouse Commission of Minnesota.

Schedule of Reasonable Maximum Terminal and Distributing Merchandise Rates.

When rates for exact distance are not shown, the rates for the next greater distance as shown on Tariff may govern.

Governed by Western Classification, with exceptions and changes made by the Railroad and Warehouse Commission of Minnesota.

Inter-station Distance rates (other than terminal or Distributing Rates) can be made based on 5% above the rates shown in this schedule.

When preparing a schedule of rates the fraction of a mill, 1 to 5/10ths may be dropped; 6 to 9/10th- may be called one mill.

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RATES FOR	MERCHANDISE In Cents per 100 Lbs.					SPECIAL CARLOAD CLASSES In Cents per 100 Lbs.				
	PERCENTAGE SCALE RELATION									
	100 %	83 1-3 %	66 2-3 %	50 %	40 %	45 %	35 %	30 %	25 %	20 %
	1	2	3	4	Fifth Class	A	B	C	D	E
5 miles	12.00	10.00	8.00	6.00	4.80	5.40	4.20	3.60	3.00	2.40
10 miles	12.98	10.82	8.65	6.49	5.19	5.84	4.55	3.89	3.25	2.60
15 miles	13.96	11.63	9.31	6.98	5.58	6.28	4.89	4.19	3.49	2.80
20 miles	14.94	12.45	9.96	7.47	5.98	6.72	5.23	4.48	3.74	2.99
25 miles	15.92	13.27	10.61	7.96	6.37	7.16	5.57	4.78	3.98	3.18
30 miles	16.90	14.08	11.27	8.45	6.76	7.61	5.92	5.07	4.23	3.38
35 miles	17.88	14.90	11.92	8.94	7.15	8.05	6.26	5.36	4.47	3.58
40 miles	18.86	15.72	12.57	9.43	7.54	8.49	6.70	5.66	4.72	3.77
45 miles	19.84	16.53	13.22	9.92	7.94	8.93	6.94	5.95	4.96	3.97
50 miles	20.82	17.35	13.88	10.41	8.33	9.37	7.29	6.25	5.21	4.16

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150 miles.....	40.42	33.68	26.94	20.21	16.17	18.19	14.15	12.13	10.11	8.08
155 miles.....	41.40	34.50	27.60	20.70	16.56	18.63	14.49	12.42	10.35	8.28
160 miles.....	42.38	35.32	28.25	21.19	16.95	19.07	14.83	12.71	10.60	8.48
165 miles.....	43.36	36.13	28.90	21.68	17.34	19.51	15.18	13.01	10.84	8.67
170 miles.....	44.34	36.95	29.56	22.17	17.74	19.95	15.52	13.30	11.09	8.87
175 miles.....	45.32	37.77	30.21	22.66	18.13	20.39	15.86	13.60	11.33	9.06
180 miles.....	46.30	38.58	30.86	23.15	18.52	20.84	16.21	13.89	11.58	9.26
185 miles.....	47.28	39.40	31.52	23.64	18.91	21.28	16.55	14.18	11.82	9.46
190 miles.....	48.26	40.22	32.17	24.13	19.30	21.72	16.89	14.48	12.07	9.65
195 miles.....	49.24	41.03	32.82	24.62	19.70	22.16	17.23	14.77	12.31	9.85
200 miles.....	50.22	41.85	33.48	25.11	20.09	22.60	17.58	15.07	12.56	10.00
210 miles.....	51.20	42.66	34.13	25.60	20.48	23.04	17.92	15.36	12.80	10.24
220 miels.....	52.18	43.48	34.78	26.09	20.87	23.48	18.26	15.65	13.05	10.43
230 miles.....	53.16	44.30	35.44	26.58	21.26	23.92	18.61	15.95	13.29	10.63
240 miles.....	54.14	45.11	36.09	27.07	21.66	24.36	18.95	16.24	13.54	10.83
250 miles.....	55.12	45.93	36.74	27.56	22.05	24.80	19.29	16.54	13.78	11.00
260 miles.....	56.10	46.75	37.40	28.05	22.40	25.25	19.64	16.83	14.03	11.22
270 miles.....	57.08	47.56	38.05	28.54	22.83	25.69	19.98	17.12	14.27	11.42
280 miles.....	58.06	48.38	38.70	29.03	23.22	26.13	20.32	17.41	14.52	11.62

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290 miles.....	59.04	49.20	39.36	29.52	23.62	26.57	20.66	17.71	14.76	11.80
300 miles.....	60.02	50.01	40.01	30.01	24.01	27.01	21.01	18.01	15.01	12.00
310 miles.....	61.00	50.83	40.66	30.50	24.40	27.45	21.35	18.30	15.25	12.20
320 miles.....	61.98	51.65	41.32	30.99	24.79	27.89	21.69	18.59	15.50	12.40
330 miles.....	62.96	52.46	41.97	31.48	25.18	28.33	22.04	18.89	15.74	12.59
340 miles.....	63.94	53.28	42.62	31.97	25.58	28.77	22.37	19.18	15.99	12.79
350 miles.....	64.92	54.10	43.28	32.46	25.97	29.21	22.72	19.48	16.23	12.98
360 miles.....	65.90	54.91	43.93	32.95	26.36	29.66	23.07	19.78	16.48	13.18
370 miles.....	66.88	55.73	44.58	33.44	26.75	30.10	23.41	20.06	16.72	13.38
380 miles.....	67.86	56.55	45.24	33.93	27.14	30.54	23.75	20.36	16.97	13.57
390 miles.....	68.84	57.36	45.89	34.42	27.54	30.98	24.19	20.65	17.21	13.77
400 miles.....	69.82	58.18	46.54	34.91	27.93	31.32	24.44	20.95	17.46	13.96
420 miles.....	70.80	59.00	47.20	35.40	28.32	31.86	24.78	21.24	17.70	14.16
440 miles.....	71.78	59.81	47.85	35.89	28.71	32.39	25.12	21.53	17.94	14.36
460 miles.....	72.76	60.63	48.50	36.38	29.10	32.74	25.47	21.83	18.19	14.55
480 miles.....	73.74	61.45	49.15	36.87	29.50	33.18	25.81	22.12	18.44	14.75
500 miles.....	74.72	62.26	49.32	37.36	29.89	33.62	26.15	22.42	18.68	14.94

EXHIBIT 2.

Before the Railroad and Warehouse Commission of the State of Minnesota.

In the Matter of the Commodity Rates to Distributing Centers Hereinafter Named, on the Line of the Northern Pacific Railway.

This matter having come before the Commission, and the evidence therein having been taken and concluded on the 2nd day of May, 1907, the Commission finds that the following named places, all in the State of Minnesota, having heretofore enjoyed distributing rates, are entitled to be known as distributing centers or terminals, viz.:

East Grand Forks,
Fergus Falls,
Brainerd,
Sauk Center,
Crookston,
Breckenridge,
Detroit,
Saint Cloud,
Moorhead.

And that the rates named in "Exhibit C," hereto annexed, are reasonable maximum rates in carload lots from the terminals of St. Paul, Minneapolis and Minnesota Transfer and Duluth to said distributing centers on the freight articles mentioned in said exhibit, and that the regulations and minimums marked upon said exhibit are reasonable minimums and regulations in regard to such rates.

It is therefore ordered, that the rates between St. Paul, Minneapolis and Minnesota Transfer and Duluth and said distributing points above named, over the Northern Pacific Railway, are hereby fixed as in "Exhibit C"; and said Railway Company is hereby forbidden to charge any higher or greater rates than the rates above named on the commodities named in "Exhibit C."

This order shall take effect on the 3rd day of June, 1907.

By the Commission,

A. C. CLAUSEN, *Secretary.*

Dated St. Paul, Minn., May 3rd, 1907.

"EXHIBIT C."

Referred to in the Commissioners' Order.

Railroad and Warehouse Commission Schedule of Reasonable Carload Commodity Rates.

ST. PAUL, MINN., *May 3rd,* 1907.

Commodities.

Cider and Vinegar, straight or mixed C. L., minimum weight 30,000 pounds.

Pickles, Kraut, Cucumber, Tomato, Cauliflower and Onion, also Vinegar, in tin cans, boxed or crated, in glass or stone, boxed or in

barrels, kegs, kits, pails, or tubs; also Table Sauces, including Catsup, Horseradish, prepared, Mustard prepared, Pepper Sauce and Salad Dressing, in glass, boxed; in tin cans, boxed or crated, or in bulk in barrels, straight or mixed C. L., minimum weight 30,000 pounds.

Condensed Milk and Evaporated Cream, in glass, boxed, in cans, jacketed, boxed or crated, or in barrels, straight or mixed C. L., minimum weight 30,000 pounds.

Fruits, Vegetables, Cove Oysters and Catsup, in tin cans, boxed or crated, or in glass or stone jars, boxed, straight or mixed C. L., minimum weight 30,000 pounds.

Paper—Building, Roof and Wrapping, in bundles, rolls, boxes or crates; also Paper Bags in bundles, straight or mixed C. L., minimum weight 30,000 pounds.

Sugar (not Maple), C. L., minimum weight 30,000 pounds.

Syrup, Glucose, Jelly, Molasses, Preserves and Fruit Butter, in wood, in tin cans, boxed or crated, or in glass or jugs, boxed; C. L., minimum weight 30,000 pounds.

Coffee, green or roasted, in bags, barrels or drums, also in packages, tin cans or pails, crated or boxed, in straight or mixed C. L., minimum weight 24,000 pounds.

Rice, in bags or in packages, boxed; straight or mixed C. L., minimum weight 30,000 pounds.

Beans, dry, in bags, C. L., minimum weight 30,000 pounds.

Canned Sardines, in tin cans, boxed or crated, C. L., minimum weight 30,000 pounds.

"EXHIBIT C."—Continued.

Referred to in Commissioners' Order.

Reasonable Maximum Carload Commodity Rates Over the Lines of the Northern Pacific Railway Company on the Commodities Named in This Exhibit from St. Paul, Minneapolis and Minnesota Transfer.

To	Rates in Cents Per 100 Pounds.	From Duluth.
East Grand Forks	21.40	21.79
Crookston	20.62	
Thief River Falls	22.58	
Fergus Falls	15.52	
Breckenridge	17.48	
Moorhead	18.66	
Sauk Center	10.82	
St. Cloud	6.50	

EXHIBIT 8.

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EXHIBIT 3.

Comparison of Terminal Rates at Important Points.

STATION		CLASSES In Cents per 100 Lbs. 1	2	3	4	5	A	B	C	D	E
Anoka	27 miles	15	13	10	8	6	6	5	5	4	3
		14.9	12.4	10.	7.5	6.	6.7	5.2	4.5	3.7	3.
Elk River	39 miles	21	18	14	11	8	8	7	6	5	4
		16.9	14.1	11.3	8.4	6.8	7.6	5.9	5.1	4.2	3.4
Becker	56 miles	30	26	20	15	12	12	11	9	7	6
		20.8	17.3	13.9	10.4	8.3	9.4	7.3	6.2	5.2	4.2
St. Cloud	74 miles	34	29	22	17	14	14	12	10	8	7
		23.8	19.8	15.8	11.9	9.5	10.7	8.3	7.1	5.9	4.7
Little Falls	106 miles	41	35	27	21	16	16	14	12	10	8
		30.6	25.5	20.4	15.3	12.2	13.8	10.7	9.2	7.7	6.1
Staples	140 miles	47	40	31	24	19	19	16	14	11	9
		36.5	30.4	24.3	18.2	14.6	16.4	12.8	11.	9.1	7.3
Wadena	158 miles	50	43	33	25	20	20	18	15	12	10
		40.4	33.7	26.9	20.2	16.2	18.2	14.1	12.1	10.1	8.1
Perham	181 miles	55	47	36	28	22	22	19	17	13	11
		45.3	37.8	30.2	22.7	18.1	20.4	15.9	13.6	11.3	9.1
Detroit	202 miles	59	50	39	30	24	24	21	18	14	12
		49.2	41.	32.8	24.6	19.7	22.2	17.2	14.8	12.3	9.8
Winnipeg Junction	223 miles	63	54	42	32	25	25	22	19	15	13
		52.2	43.5	34.8	26.1	20.9	23.5	18.3	15.6	13.	10.4
Twin Valley	248 miles	67	57	44	34	27	27	23	20	16	13
		54.1	45.1	36.1	27.1	21.7	24.4	18.9	16.2	13.5	10.8
Crookston	291 miles	67	57	44	34	27	27	23	20	16	13
		59.	49.2	39.4	29.5	23.6	26.6	20.7	17.7	14.8	11.8
East Grand Forks	318 miles	67	57	44	37	27	27	23	20	16	13
		61.	50.8	40.7	30.5	24.4	27.	21.3	18.3	15.2	12.2

Large type figures show former rates.
Small type figures show present rates which are those of the Minnesota Railway Commission.

EXHIBIT 3.—Continued.

Comparison of Minnesota Distance Tariff Rates.

DISTANCE.	CLASSES In Cents per 100 Lbs.									
	1	2	3	4	5	A	B	C	D	E
25 miles	19 16.7	16 13.9	13 11.1	10 8.4	8 6.7	8 7.5	7 5.8	6 5.	5 4.2	4 3.3
50 miles	31 21.9	26 18.2	20 14.6	16 10.9	12 8.7	12 9.8	11 7.6	9 6.6	7 5.5	6 4.4
75 miles	38 27.	32 22.5	25 18.	19 13.5	15 10.8	15 12.2	13 9.5	11 8.1	9 6.7	8 5.4
100 miles	43 32.1	37 26.8	28 21.4	22 16.1	17 12.9	17 14.5	15 11.2	13 9.6	10 8.	9 6.4
125 miles	48 37.3	41 31.1	32 24.9	24 18.6	19 14.9	19 16.8	17 13.	14 11.2	12 9.3	10 7.4
150 miles	53 42.4	45 35.4	35 28.3	27 21.2	21 17.	21 19.1	19 14.9	16 12.7	13 10.6	11 8.5
175 miles	58 47.6	49 39.7	38 31.7	29 23.8	23 19.	23 21.4	20 16.6	17 14.3	14 11.9	12 9.5
200 miles	63 52.7	54 43.9	42 35.1	32 26.4	25 21.1	25 23.7	22 18.5	19 15.8	15 13.2	13 10.5
220 miles	67 54.8	57 45.6	44 36.5	34 27.4	27 21.9	27 24.6	23 19.2	20 16.4	16 13.7	13 10.9
240 miles	71 56.8	60 47.4	47 37.9	36 28.4	28 22.7	28 25.6	25 19.9	21 17.	17 14.2	14 11.4
260 miles	75 58.9	64 49.1	50 39.3	38 29.4	30 23.5	30 26.5	26 20.6	23 17.7	18 14.7	15 11.8
280 miles	79 61.	67 50.8	52 40.6	40 30.5	32 24.4	32 27.4	28 21.3	24 18.3	19 15.2	16 12.2
300 miles	83 63.	71 52.5	55 42.	42 31.5	33 25.2	33 28.4	29 22.1	25 18.9	20 15.8	17 12.6

Large type figures show former rates.

Small type figures show present rates which are those of the Minnesota Railway Commission.

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EXHIBIT 4.

H. F. 1190. Chap. 232.

An Act Relating to Railroad Freight Rates in the State of Minnesota, and Defining Certain Duties of the Railroad and Warehouse Commission.

Be It Enacted by the Legislature of the State of Minnesota:

SECTION 1. For the purposes of this act the commodities hereinafter named are classified as follows: Wheat, flax seed, broom corn seed, hemp seed, millet seed, popcorn, castor beans, Hungarian seed, buckwheat, buckwheat flour, potato flour, wheat flour, prepared flour, and all uncooked grain or cereal products manufactured from wheat, shall constitute class eleven (11); corn, oats, rye, barley, alfalfa feed, alfalfa meal, bran, brewers' grits, brewers' meal, brewers' refuse (dry), chopped feed, other than wheat chops, corn flour, corn meal, cotton seed cake, cotton seed hulls, cotton seed meal, gluten feed, gluten meal, grain screenings, hominy feed, kafir corn, linseed cake, linseed meal, middlings, shorts, sorghum seed, speltz, wild mustard seed, oat groats, rolled oats, oat dust, oat hulls, oat meal, rolled rye, rye flour, malt, pearl barley and all uncooked grain or cereal products manufactured from corn, oats or rye, shall constitute class twelve (12); lumber, lath, shingles, sash, doors and blinds shall constitute class thirteen (13); sheep (when carried in double-decked cars) and cattle shall constitute class fourteen (14); sheep (when carried in single decked cars) and hogs shall constitute class fifteen (15): hard coal shall constitute class sixteen (16); soft coal shall constitute class seventeen (17).

SECTION 2. The following are hereby established and declared to be the reasonable maximum rates to be charged by Railroad Companies as common carriers of property in the State of Minnesota, for the transportation, in car load lots, of the commodities belonging to the classes named in section one (1) of this act, between stations in the State of Minnesota for the distances named in the following schedules, to-wit:

Distance in miles.	Rates for commodities in classification No. 11, in cents per 100 lbs.	Rates for commodities in classification No. 12, in cents per 100 lbs.	Rates for commodities in classification No. 13, in cents per 100 lbs.	Rates for commodities in classification No. 14, in cents per 100 lbs.	Rates for commodities in classification No. 15, in cents per 100 lbs.	Rates for commodities in classification No. 16, in dollars & cents per ton.	Rates for commodities in classification No. 17, in dollars & cents per ton.
5	2.7	2.7	2.7	4.4	4.9	.54	.44
10	3.3	2.8	3.3	5.	5.5	.62	.49
15	3.8	3.4	3.8	5.5	6.3	.63	.51
20	4.4	3.8	4.4	6.3	6.8	.65	.52
25	4.6	4.	5.4	6.7	7.6	.69	.54
30	4.8	4.2	5.6	7.4	8.3	.70	.57
35	5.	4.5	5.8	7.9	9.	.72	.58
40	5.2	4.6	6.	8.6	9.7	.74	.59
45	5.4	4.8	6.3	9.2	10.3	.75	.61
50	5.7	5.	6.5	9.8	11.	.77	.62
55	5.9	5.1	6.8	10.	11.3	.81	.64
60	6.1	5.3	7.0	10.2	11.5	.83	.65
65	6.3	5.5	7.4	10.5	11.8	.85	.69
70	6.5	5.8	7.5	10.7	12.	.87	.70
75	6.7	6.	7.7	10.9	12.3	.89	.72
80	7.	6.2	8.1	11.1	12.5	.93	.74
85	7.2	6.3	8.3	11.3	12.7	.95	.75
90	7.4	6.5	8.5	11.5	13.	.97	.77
95	7.6	6.7	8.7	11.8	13.3	.99	.80
100	7.8	7.	9.	12.	13.5	1.01	.82
105	7.9	7.	9.2	12.2	13.7	1.04	.83
110	8.1	7.	9.3	12.4	13.9	1.06	.84
115	8.2	7.2	9.4	12.6	14.3	1.07	.85
120	8.2	7.2	9.4	12.8	14.5	1.08	.86
125	8.3	7.3	9.5	13.	14.7	1.10	.87
130	8.4	7.4	9.6	13.3	14.9	1.11	.88
135	8.5	7.4	9.8	13.5	15.3	1.12	.92
140	8.5	7.5	9.8	13.7	15.5	1.16	.93
145	8.6	7.6	9.9	13.9	15.7	1.17	.94
150	8.7	7.6	10.	14.2	15.9	1.19	.95
155	8.8	7.7	10.1	14.4	16.2	1.20	.96
160	8.8	7.8	10.1	14.6	16.4	1.22	.98
165	9.	7.9	10.4	14.8	16.7	1.24	1.00
170	9.	7.9	10.4	15.	16.9	1.29	1.01
175	9.1	8.1	10.6	15.3	17.2	1.31	1.05
180	9.1	8.1	10.6	15.5	17.4	1.33	1.07
185	9.3	8.2	10.7	15.7	17.6	1.35	1.09
190	9.4	8.3	10.8	15.9	17.9	1.37	1.10
195	9.5	8.3	10.9	16.1	18.2	1.42	1.12
200	9.6	8.4	11.	16.3	18.4	1.44	1.16
210	9.7	8.5	11.1	16.6	18.6	1.48	1.19
220	9.8	8.6	11.2	16.8	18.8	1.54	1.22

230	9.9	8.7	11.4	17.	19.1	1.58	1.28
240	10.	8.8	11.6	17.2	19.4	1.63	1.31
250	10.2	8.9	11.8	17.4	19.6	1.68	1.34
260	10.3	9.1	11.9	17.6	19.8	1.72	1.37
270	10.5	9.3	12.	17.9	20.2	1.78	1.42
280	10.6	9.4	12.2	18.1	20.4	1.82	1.46
290	10.8	9.5	12.4	18.3	20.6	1.87	1.49
300	10.9	9.6	12.5	18.5	20.8	1.92	1.54
310	11.	9.7	12.6	18.7	21.1	1.94	1.56
320	11.1	9.8	12.8	19.	21.4	1.96	1.57
330	11.2	9.9	12.9	19.2	21.6	1.99	1.59
340	11.3	9.9	13.1	19.4	21.8	2.02	1.60
350	11.4	10.	13.2	19.6	22.1	2.04	1.63
360	11.5	10.1	13.3	19.8	22.3	2.06	1.66
370	11.7	10.2	13.4	20.	22.6	2.08	1.67
380	11.8	10.3	13.5	20.3	22.8	2.11	1.69
390	11.9	10.5	13.6	20.5	23.1	2.13	1.70
400	12.	10.6	13.7	20.7	23.3	2.16	1.72

SECTION 3. When the exact distance which a commodity is transported is not given in the foregoing schedule, the carrier may charge the rate specified in the said schedule for the next greater distance. In order to constitute a car load, within the meaning of this act, the weight of the commodity in any one car shall be at least as follows: Class eleven (11) and class twelve (12), twenty-four thousand (24,000) pounds; class thirteen (13), twenty thousand (20,000) pounds; class fourteen (14), nineteen thousand (19,000) pounds; class fifteen (15), fifteen thousand (15,000) pounds; classes sixteen (16) and seventeen (17), thirty thousand (30,000) pounds.

SECTION 4. No Railroad Company, which is a common carrier of property within the State of Minnesota, shall charge, take or receive any greater sum for carrying within this state, between stations therein, any of the commodities named in this act than the respective amounts set forth and provided for in section two of this act for the respective distances therein named.

SECTION 5. This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this state. Whenever in a proceeding regularly pending before the Railroad and Warehouse Commission, it shall be made to appear to the satisfaction of said Commission that the rates herein prescribed are unreasonable, it may by order fix higher or lower rates for the transportation of any of the commodities herein mentioned, over the line of any railroad in this state, and such rates when so fixed shall supersede the rates herein prescribed upon said line of railroad, and shall be enforced as prescribed by the law relating to such orders, and until such order shall have been made by said Railroad and Warehouse Commission the rates herein prescribed shall be the exclusive legal maximum rates for the transportation of the commodities herein enumerated between points within this state.

SECTION 6. Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it, between stations upon its line of road in this state, of the commodities named in this act; and every officer, director, traffic manager or agent or employé of such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by said railroad company of rates not exceeding those specified in this act; and any officer, director or such agent or employé of any such railroad company who violates any of the provisions of this section, or who causes, or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

SECTION 7. If at the time of the taking effect of this act any railroad is maintaining a rate between any two stations in this state that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

SECTION 8. This act shall take effect and be in force from and after June 1, 1907.

L. H. JOHNSON,
Speaker of the House of Representatives.
ADOLPH O. EBERHART,
President of the Senate.

House File No. 1190.

An Act relating to railroad freight rates in the State of Minnesota, and defining certain duties of the Railroad and Warehouse Commission.

Passed the House of Representatives the ninth (9th) day of April, one thousand nine hundred and seven (1907). Senate amendment concurred in and repassed as amended the fifteenth (15th) day of April, one thousand nine hundred and seven (1907).

ADOLPH E. L. JOHNSON,
Chief Clerk of the House of Representatives.

Passed the Senate the twelfth (12th) day of April, one thousand nine hundred and seven (1907). Vote by which bill was passed reconsidered; bill amended and repassed as amended the thirteenth (13th) day of April, one thousand nine hundred and seven (1907).

S. A. LANGUM,
Secretary of the Senate.

Approved April 18th, 1907.

JOHN A. JOHNSON,
Governor of the State of Minnesota.

Filed April 18th.

JULIUS A. SCHMALL,
Secretary of State.

Distance in Miles.	Wheat, Flour.			Coarse Grain.			Lumber.		Sheep. D.	
	Rate for Commodities in Classification No. 11, in cents per 100 lbs.	Distance.	Terminal.	Rate for Commodities in Classification No. 12, in cents per 100 lbs.	Distance.	Terminal.	Rate for Commodities in Classification No. 13, in cents per 100 lbs.	Distance.	Rate for Commodities in Classification No. 14, in cents per 100 lbs.	Distance.
5	2.7	4.	3.5	2.7	4.	3.5	2.7	3.5	4.4	5.
10	3.3	4.	3.5	2.8	4.	3.5	3.3	3.5	5.	5.
15	3.8	4.5	3.5	3.4	4.5	3.5	3.8	4.	5.5	6.
20	4.4	5.	4.5	3.8	5.	4.5	4.4	4.5	6.3	6.
25	4.6	5.5	5.	4.	5.5	5.	5.4	5.	6.7	7.
30	4.8	6.	5.5	4.2	6.	5.5	5.6	5.5	7.4	8.
35	5.	6.5	6.	4.5	6.5	6.	5.8	6.	7.9	9.
40	5.2	6.	6.	4.6	6.	6.	6.	6.	8.9	10.
45	5.4	6.5	6.	4.8	6.5	6.	6.3	6.5	9.2	11.
50	5.7	7.	6.5	5.	7.	6.5	6.5	7.	9.8	12.
55	5.9	7.5	7.	5.1	7.5	7.	6.8	7.5	10.	12.
60	6.1	8.	7.	5.3	8.	7.	7.0	8.	10.2	13.
65	6.3	8.5	7.	5.5	8.5	7.	7.4	8.5	10.5	13.
70	6.5	9.	7.	5.8	9.	7.	7.5	9.	10.7	14.
75	6.7	9.5	7.	6.	9.5	7.	7.7	9.5	10.9	14.
80	7.	9.5	7.	6.2	9.5	7.	8.1	9.5	11.1	15.
85	7.2	10.	7.5	6.3	10.	7.5	8.3	10.	11.3	15.
90	7.4	10.5	7.5	6.5	10.5	7.5	8.5	10.5	11.5	16.
95	7.6	11.	7.5	6.7	11.	7.5	8.7	11.	11.8	16.
100	7.8	11.5	7.5	7.	11.5	7.5	9.	11.5	12.	17.
105	7.9	12.	8.	7.	12.	8.	9.2	12.	12.2	18.
110	8.1	12.	8.	7.	12.	8.	9.3	12.	12.4	18.
115	8.2	12.5	8.	7.2	12.5	8.	9.4	12.5	12.6	18.
120	8.2	12.5	8.2	7.2	12.5	8.5	9.4	12.5	12.8	18.
125	8.3	13.	8.5	7.3	13.	8.5	9.5	13.	13.	19.
130	8.4	13.	9.	7.4	13.	9.	9.6	13.	13.3	19.
135	8.5	13.5	9.	7.4	13.5	9.	9.8	13.5	13.5	19.
140	8.5	13.5	9.	7.5	13.5	9.	9.8	13.5	13.7	19.
145	8.6	14.	9.5	7.6	14.	9.5	9.9	14.	13.9	20.
150	8.7	14.	9.5	7.6	14.	9.5	10.	14.	14.2	20.
155	8.8	14.5	9.5	7.7	14.5	9.5	10.1	14.5	14.4	20.

EXHIBIT 5.

Distance in Miles.	Wheat, Flour.			Coarse Grain.			Lumber.		Sheep. D. D., Cattle.			Sheep. S. D., Hogs.				Hard Coal.		Soft Coal.	
	Rate for Commodities in Classification No. 11, in cents per 100 lbs.	Distance.	Terminal.	Rate for Commodities in Classification No. 12, in cents per 100 lbs.	Distance.	Terminal.	Rate for Commodities in Classification No. 13, in cents per 100 lbs.	Distance.	Rate for Commodities in Classification No. 14, in cents per 100 lbs.	Distance.	Terminal.	Rate for Commodities in Classification No. 15, in cents per 100 lbs.	Hog Distance.	Sheep Terminal.	Hog Terminal.	Rate for Commodities in Classification No. 16, in dollars and cents per ton.	Terminal from Duluth.	Rate for Commodities in Classification No. 17, in dollars and cents per ton.	Terminal from Duluth
5	2.7	4.	3.5	2.7	4.	3.5	2.7	3.5	4.4	5.5	4.25	4.9	7.	5½	5½	.54	.60	.44	.60
10	3.3	4.	3.5	2.8	4.	3.5	3.3	3.5	5.	5.5	4.25	5.5	7.	5½	5½	.62	.60	.49	.60
15	3.8	4.5	3.5	3.4	4.5	3.5	3.8	4.	5.5	6.	4.25	6.3	7.8	6¾	6¾	.63	.60	.51	.60
20	4.4	5.	4.5	3.8	5.	4.5	4.4	4.5	6.3	6.5	5¼	6.8	8.5	8½	6¾	.65	.60	.52	.60
25	4.6	5.5	5.	4.	5.5	5.	5.4	5.	6.7	7.6	6¾	7.6	9.9	8½	8½	.69	.60	.54	.60
30	4.8	6.	5.5	4.2	6.	5.5	5.6	5.5	7.4	8.7	7¾	8.3	11.3	9¾	9¾	.70	.70	.57	.70
35	5.	6.5	6.	4.5	6.5	6.	5.8	6.	7.9	9.8	8.	9.	12.7	10.	10.	.72	.80	.58	.80
40	5.2	6.	6.	4.6	6.	6.	6.	6.	8.9	10.9	8¼	9.7	14.1	10¾	10½	.74	.90	.59	.85
45	5.4	6.5	6.	4.8	6.5	6.	6.3	6.5	9.2	11.4	8.5	10.3	14.8	10¾	10¾	.75	.90	.61	.85
50	5.7	7.	6.5	5.	7.	6.5	6.5	7.	9.8	12.	8.5	11.	15.5	12.	12	.77	1.00	.62	.90
55	5.9	7.5	7.	5.1	7.5	7.	6.8	7.5	10.	12.5	9.5	11.3	16.2	13¼	13¼	.81	1.00	.64	.90
60	6.1	8.	7.	5.3	8.	7.	7.0	8.	10.2	13.	10.5	11.5	16.9	13¼	13¼	.83	1.05	.65	.95
65	6.3	8.5	7.	5.5	8.5	7.	7.4	8.5	10.5	13.6	10¾	11.8	17.6	13½	13½	.85	1.05	.69	.95
70	6.5	9.	7.	5.8	9.	7.	7.5	9.	10.7	14.2	10¾	12.	18.3	14.	13½	.87	1.10	.70	1.00
75	6.7	9.5	7.	6.	9.5	7.	7.7	9.5	10.9	14.7	11.	12.3	19.	14.	14.	.89	1.10	.72	1.00
80	7.	9.5	7.	6.2	9.5	7.	8.1	9.5	11.1	15.3	11.	12.5	18.8	14.	14.	.93	1.15	.74	1.05
85	7.2	10.	7.5	6.3	10.	7.5	8.3	10.	11.3	15.8	11.5	12.7	20.5	14½	14.5	.95	1.15	.75	1.05
90	7.4	10.5	7.5	6.5	10.5	7.5	8.5	10.5	11.5	16.4	12.	13.	21.2	15.	15¼	.97	1.20	.77	1.10
95	7.6	11.	7.5	6.7	11.	7.5	8.7	11.	11.8	16.9	12.	13.3	21.9	15¾	15¾	.99	1.20	.80	1.10
100	7.8	11.5	7.5	7.	11.5	7.5	9.	11.5	12.	17.4	12.5	13.5	22.6	16¼	16¼	1.01	1.25	.82	1.15
105	7.9	12.	8.	7.	12.	8.	9.2	12.	12.2	18.	12¾	13.7	23.3	16½	16¾	1.04	1.25	.83	1.15
110	8.1	12.	8.	7.	12.	8.	9.3	12.	12.4	18.	13¼	13.9	23.3	16½	17¾	1.06	1.30	.84	1.20
115	8.2	12.5	8.	7.2	12.5	8.	9.4	12.5	12.6	18.5	14.	14.3	24.	16¾	18.	1.07	1.35	.85	1.25
120	8.2	12.5	8.2	7.2	12.5	8.5	9.4	12.5	12.8	18.5	14¼	14.5	24.	16½	18.	1.08	1.40	.86	1.30
125	8.3	13.	8.5	7.3	13.	8.5	9.5	13.	13.	19.2	14¼	14.7	24.7	16½	18.	1.10	1.45	.87	1.35
130	8.4	13.	9.	7.4	13.	9.	9.6	13.	13.3	19.2	14½	14.9	14.7	16½	18.	1.11	1.50	.88	1.40
135	8.5	13.5	9.	7.4	13.5	9.	9.8	13.5	13.5	19.6	14¾	15.3	25.4	16¾	18.	1.12	1.55	.92	1.45
140	8.5	13.5	9.	7.5	13.5	9.	9.8	13.5	13.7	19.6	14¾	15.5	25.4	16¾	18.	1.16	1.60	.93	1.50
145	8.6	14.	9.5	7.6	14.	9.5	9.9	14.	13.9	20.2	14¾	15.7	26.2	17¼	18.	1.17	1.70	.94	1.60
150	8.7	14.	9.5	7.6	14.	9.5	10.	14.	14.2	20.2	14¾	15.9	26.2	17¾	18.	1.19	1.75	.95	1.65
155	8.8	14.5	9.5	7.7	14.5	9.5	10.1	14.5	14.4	20.7	14¾	16.2	26.8	17¾	18¼	1.20	1.75	.96	1.65
160	8.8	14.5	9.5	7.8	14.5	9.5	10.1	14.5	14.6	20.7	14.5	16.4	26.8	17¾	18¼	1.22	1.75	.98	1.65

EXHIBIT 5.—Continued.

Distance in Miles.	Wheat. Flour. Rate for Commodities in Classification No. 11, in cents per 100 lbs.	Distance.	Terminal.	Coarse Grain. Rate for Commodities in Classification No. 12, in cents per 100 lbs.	Distance.	Terminal.	Lumber. Rate for Commodities in Classification No. 13, in cents per 100 lbs.	Distance.	Sheep. D. D., Cattle. Rate for Commodities in Classification No. 14, in cents per 100 lbs.	Distance.	Terminal.	Sheep. S. D., Hogs. Rate for Commodities in Classification No. 15, in cents per 100 lbs.	Hog Distance.	Sheep Terminal.	Hog Terminal.	Hard Coal. Rate for Commodities in Classification No. 16, in dollars and cents per ton.	Terminal from Duluth.	Soft Coal. Rate for Commodities in Classification No. 17, in dollars and cents per ton.	Terminal. from Duluth.
165	9.	15.	9.5	7.9	15.	9.5	10.4	15.	14.8	21.3	14.5	16.7	27.5	17¾	18¾	1.24	1.80	1.00	1.70
170	9.	15.	10.	7.9	15.	10.	10.4	15.	15.	21.3	14¾	16.9	27.5	18¼	19¼	1.29	1.85	1.01	1.75
175	9.1	16.	10.	8.1	16.	10.	10.6	15.5	15.3	21.8	15¼	17.2	28.2	18¾	19¾	1.31	1.90	1.05	1.80
180	9.1	16.	10.	8.1	16.	10.	10.6	15.5	15.5	21.8	15¾	17.4	28.2	18¾	20.	1.33	1.90	1.07	1.80
185	9.3	16.5	10.	8.2	16.5	10.	10.7	16.	15.7	22.4	16.	17.6	28.9	...	20.5	1.35	1.90	1.09	1.80
190	9.4	16.5	10.	8.3	16.5	10.	10.8	16.	15.9	22.4	16¼	17.9	28.9	...	20.5	1.37	1.90	1.10	1.80
195	9.5	17.	10.	8.3	17.	10.	10.9	16.5	16.1	22.9	16.5	18.2	29.6	...	21.5	1.42	1.90	1.12	1.80
200	9.6	17.	10.	8.4	17.	10.	11.	16.5	16.3	22.9	17.	18.4	29.6	...	21.5	1.44	1.90	1.16	1.80
210	9.7	17.5	10.5	8.5	17.5	10.5	11.1	17.	16.6	23.4	17.5	18.6	30.3	...	22.	1.48	1.95	1.19	1.85
220	9.8	18.	10.5	8.6	18.	10.5	11.2	17.5	16.8	24.	17¾	18.8	31.1	...	23.5	1.54	2.10	1.22	1.90
230	9.9	18.5	11.	8.7	18.5	11.	11.4	18.	17.	24.5	18.5	19.1	31.8	...	24	1.58	2.10	1.28	2.00
240	10.	19.	11.	8.8	19.	11.	11.6	18.5	17.2	25.1	18¾	19.4	32.5	...	24¾	1.63	2.10	1.31	2.00
250	10.2	19.5	11.	8.9	19.5	11.	11.8	19.	17.4	25.6	19.	19.6	33.2	...	24¾	1.68	2.10	1.34	2.00
260	10.3	20.	11.	9.1	20.	11.	11.9	19.5	17.6	26.1	19.5	19.8	33.9	...	25.	1.72	2.10	1.37	2.00
270	10.5	20.5	11.	9.3	20.5	11.	12.	20.	17.9	26.7	19¾	20.2	34.6	...	25¼	1.72	2.10	1.42	2.00
280	10.6	21.	11.	9.4	21.	11.	12.2	20.5	18.1	27.3	20.	20.4	35.3	...	25¼	1.82	2.10	1.46	2.00
290	10.8	21.5	11.	9.5	21.5	11.	12.4	21.	18.3	27.8	20¼	20.6	36.	...	26.	1.87	2.10	1.49	2.00
300	10.9	22.	11.	9.6	22.	11.	12.5	21.5	18.5	28.4	20¼	20.8	36.7	...	26.	1.92	2.10	1.54	2.00
310*	11.	22.	11.	9.7	22.	11.	12.6	22.	18.7	28.9	20¼	21.1	37.4	...	26.	1.94	2.10	1.56	2.00
320	11.1	22.5	...	9.8	22.5	...	12.8	22.5	19.	29.4	...	21.4	38.1	...	...	1.96	....	1.57	....
330	11.2	23.	...	9.9	23.	...	12.9	23.	19.2	30.	...	21.6	38.8	...	...	1.99	....	1.59	....
340	11.3	23.5	...	9.9	23.5	...	13.1	23.5	19.4	30.5	...	21.8	39.5	...	...	2.02	....	1.60	....
350	11.4	24.	...	10.	24.	...	13.2	24.	19.6	31.1	...	22.1	40.2	...	...	2.04	....	1.63	....
360	11.5	24.	...	10.1	24.	...	13.3	24.5	19.8	31.6	...	22.3	40.9	...	...	2.06	....	1.66	....
370	11.7	24.5	...	10.2	24.5	...	13.4	25.	20.	32.2	...	22.6	41.6	...	...	2.08	....	1.67	....
380	11.8	25.	...	10.3	25.	...	13.5	25.5	20.3	32.7	...	22.8	42.3	...	...	2.11	....	1.69	....
390	11.9	25.5	...	10.5	25.5	...	13.6	26.	20.5	33.3	...	23.1	43.	...	...	2.13	....	1.70	....
400	12.	26.	...	10.6	26.	...	13.7	26.5	20.7	33.8	...	23.3	43.8	...	...	2.16	....	1.72	....

*310 miles furthest distance in Minnesota on N. P.

First column shows rates established by the Act, second and third columns show present distance and terminal rates, respectively.

Exhibit 6.

An Act Prescribing the Maximum Rate to be Charged for the Transportation of Passengers Upon Railroads Within the State of Minnesota, Providing for the Enforcement of the Same and Penalties for the Violation Thereof.

Be It Enacted by the Legislature of the State of Minnesota.

Section 1. No railroad company owning, operating or using a line of railroad within, or partly within, the State of Minnesota, shall charge or collect more than two (2) cents per mile for carrying over its road on any trip wholly within the state any passenger of twelve (12) years of age or over, together with baggage not exceeding one hundred and fifty (150) pounds in weight, or more than one (1) cent per mile for any such passenger under twelve (12) years of age, together with baggage not exceeding seventy-five (75) pounds in weight.

Section 2. Any railroad company or any officer, agent or representative thereof, who shall violat- any provision of this act shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years or both such fine and imprisonment.

Section 3. This act shall take effect and be in force from and after the 1st day of May, 1907.

(Endorsed:) Bill of Complaint. Filed May 29th, 1907. Henry D. Lang, Clerk, by Louise B. Trott, Deputy.

Circuit Court of the United States, District of Minnesota, Third Division.

Charles E. Perkins and David C. Shepard, Complainants,

vs.

Northern Pacific Railway Company, Edward T. Young, Ira B. Mills, Charles F. Staples, William E. Young, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud, and Adolph E. Michaud, Defendants.

Upon motion by counsel for complainants, and upon reading affidavits in support thereof and in opposition thereto, and after hearing counsel for complainants and for defendants.

This Court doth order that the defendant Northern Pacific Railway Company, its officers, directors, agents, servants and employees, and each of them, be restrained and enjoined pending the final hearing of this cause, and until the further order of this Court in the premises, from publishing, adopting, or putting into effect the tariffs, rates or charges set forth in the Act of the Legislature of

the State of Minnesota approved April 18, 1907, and entitled "An Act Relating to Railroad Freight Rates in the State of Minnesota, and Defining Certain Duties of the Railroad and Warehouse Commission," or any thereof.

That the defendant Edward T. Young, as Attorney General of said State of Minnesota be restrained and enjoined, pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said Act or either thereof, or to compel obedience to said Act or compliance therewith, or any part thereof.

That the defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and each of them, and all other persons, and each of them, from and after the time that they shall have knowledge of this Order, be restrained and enjoined pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting, or causing or advising to be instituted, any action, suit, step or proceeding for the violation of said Act, or from demanding that any of the rates contained therein be given to them, or either of them. Let a writ issue accordingly.

WM. LOCHREN, *Judge.*

Dated September 23, 1907.

"Endorsed: Ent'd T. M., Vol. 36, p. 270. Order for Temporary Injunction. Filed September 23d, 1907. Henry D. Lang, Clerk."

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with J. M. Hannaford, Second Vice President of said Company personally and by exhibiting Judge Lochren's original signature at St. Paul in said District on the 31st day of May, 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Edward T. Young, Attorney General for the State of Minnesota, by handing to and leaving a true and correct copy thereof with him

and by exhibiting Judge Lochren's original signature personally at St. Paul, in said District on the 31st day of May, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Ira B. Mills, Charles F. Staples and Wm. E. Young by handing to and leaving a true and correct copy thereof with each of them and by exhibiting Judge Lochren's original sugnature personally at St. Paul in said District on the 1st day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna and Order to Show Cause on the therein-named E. A. Evarts by handing to and leaving a true and correct copy thereof with him personally at Battle Lake in said District on the 5th day of June, A. D. 1907.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By H. A. RIDER, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named J. Rumsey Reeve by handing to and leaving a true and correct copy thereof with J. Rumsey Reeve by exhibiting Judge Lochren's Original signature personally at Morris in said District on the 4th day of June A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By FRED'K VAN DOREN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein-named Achille Michaud, Charles Michaud and Adolph E. Michaud by handing to and leaving a true and correct copy thereof with each of them and by exhibiting Judge Lochren's original signature personally at St. Paul in said District on the 1st day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on H. J. Horn General Manager J. G. Woodworth General Traffic Manager, J. B. Baird General Freight Agent and A. M. McCleland General Passenger Agent and C. P. O'Donnell City Ticket Agent of the Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with each of them and by exhibiting the original signature of Judge Lochren personally at St. Paul in said District on the 1st day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Restraining Order and Order to Show Cause on the therein named Northern Pacific Railway Company, *et al.*, by handing to and leaving a true and correct copy thereof with G. F. McNeill, City Passenger and Ticket Agent of said Company, and by exhibiting Judge Lochren's original signature to him personally at Minneapolis in said District on the third day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

The complainants having filed their verified bill of complaint in this Court against the defendants above named, praying for a temporary and permanent injunction, and in the meantime for a restraining order, and this Court having duly read and considered said bill of complaint:

Now, on motion of How, Butler & Mitchell, and Edward S. Roberts, solicitors for said complainants,

It is Ordered, That said defendants, and each of them, show cause before this Court at the Federal Building, at Saint Paul, Minnesota, on the 12th day of June, 1907, at ten o'clock in the forenoon of that day, why a temporary injunction should not issue in accordance with the prayer in said bill of complaint contained.

That in the meantime, and until further order of the Court in the premises, the said defendant Northern Pacific Railway Company its officers, directors, agents and employés, be and they are hereby restrained from publishing or adopting the classifications, tariffs and charges set forth in the Act of the Legislature of the State of Minnesota, approved April 18, 1907, and described in said complaint, or from reducing its tariffs to the figures set forth in said Act.

That in the meantime, and until the further order of the Court in the premises, said defendant, Edward T. Young, Attorney General of the State of Minnesota, is hereby restrained from taking, or causing to be taken, any action, step or proceeding against said Railway Company, its officers, directors, agents or employés, to enforce the penalties and remedies specified in said Act approved April 18, 1907.

That in the meantime, and until the further order of the Court in the premises, the said defendants, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and other shippers affected by this proceeding, and each of them, are hereby restrained from instituting any action for the violation of said Act approved April 18, 1907, or from demanding that any of the rates contained therein be given to them, or either or any of them.

Dated, St. Paul, Minnesota, May 31, 1907.

WM. LOCHREN, *Judge.*

[Endorsed:] U. S. Circuit Court, District of Minnesota, Third Division. Charles E. Perkins *et al.*, Complainants, *vs.* Northern

Pacific Ry. Co., Defendants. Restraining Order and Order to Show Cause. How, Butler & Mitchell, Solicitors for Complainants.

"Endorsed: Restraining Order. Filed May 31st, 1907. Henry D. Lang, Clerk. By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Præcipe for Chancery Subpœna.

To the Clerk of the above named Court:

Please issue Chancery Subpœna for each of the above named defendants, returnable at July Rules, 1907, and deliver same to the Marshal for service.

Dated May 31, 1907.

HOW, BUTLER & MITCHELL,
Complainants' Solicitors.

"Endorsed: Præcipe for Chancery Subpœna. Ent. C. R. C, p. 4. Filed May 31, 1907. Henry D. Lang, Clerk, By Louise B. Trott, Deputy."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

MAY 31.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

The complainant- herein having filed a Bill in Equity in this cause, on application of How, Butler & Mitchell, Solicitors for said complainants, it is hereby ordered that a Chancery Subpœna issue as therein prayed.

Ent'd C. R. "C" p. 4.

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna & Restraining Order on the therein-named O. J. Whiteman by handing to and leaving a true and correct copy thereof with him personally at Elk River in said District on the 10th day of June, A. D. 1907.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By H. A. RIDER, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with J. M. Hannaford Second Vice President of said Company personally at St. Paul in said District on the 31st day of May, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named Edward T. Young, Attorney General for the State of Minnesota by handing to and leaving a true and correct copy thereof with him personally at St. Paul in said District on the 31st day of May, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named Ira B. Mills, Charles F. Staples and Wm. E. Young by handing to and leaving a true and correct copy thereof with each of them personally at St. Paul in said District on the 1st day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named Achille Michaud, Charles Michaud and Adolph E. Michaud by handing to and leaving a true and correct copy thereof with each of them personally at St. Paul in said District on the 1st day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named J. Rumsey Reeve by handing to and leaving a true and correct copy thereof with J. Rumsey Reeve personally at Morris in said District on the 4th day of June, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal.
By FRED VAN DOREN, *Deputy.*

(Original.)

UNITED STATES OF AMERICA,
District of Minnesota, Third Division:

The President of the United States of America to Northern Pacific Railway Company, Edward T. Young, Ira B. Mills, Charles F. Staples, William E. Young, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud, and Adolph E. Michaud, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of July next, at the city of St. Paul, then and there to answer the Bill of Complaint of Charles E. Perkins and David C. Shepard, citizens of the State of Minnesota, filed against you on the 31st day of May, A. D. 1907, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 31st day of May, 1907. Issued at my office in the City of St. Paul under the seal of said Circuit Court, the day and year last aforesaid.

[U. S. Circuit Court Seal, Third Division, District of Minnesota.]

HENRY D. LANG, *Clerk,*
By LOUISE B. TROTT, *Deputy.*

MEMORANDUM.—The above named defendants to enter their appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable, otherwise the bill may be taken *pro confesso*.

HENRY D. LANG, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

HOW, BUTLER & MITCHELL,
EDWARD S. ROBERT,
Complainants' Solicitors.

"Endorsed: Chancery Subpœna. (Original.) Filed June 11th, 1907. Henry D. Lang, Clerk. By Louise B. Trott, Deputy. How, Butler & Mitchell & E. S. Roberts, Complainants' Solicitors."

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

To Henry D. Lang, Esq., Clerk of United States Circuit Court, St. Paul, Minnesota:

Please enter my appearance for the defendant, Northern Pacific Railway Company, in the above entitled suit.
June 1, 1907.

CHARLES W. BUNN,
Attorney Northern Pacific Railway Company,
St. Paul, Minnesota.

"Endorsed: Notice of Appearance of C. W. Bunn for N. P. Ry. Co. Filed June 1st, 1907. Henry D. Lang, Clerk. By Louise B. Trott, Deputy."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

JUNE 1.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC R'Y CO. ET AL.

This day comes the defendant Northern Pacific Railway Company by C. W. Bunn, Solicitor on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

Entd. C. R. "C" p. 107.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Appearance.

The Clerk will enter our appearance for Ira B. Mills, Charles F. Staples and William E. Young, three of the defendants in the above entitled cause.

E. T. YOUNG,
THOMAS D. O'BRIEN,
ROYAL A. STONE,
Solicitors for said Defendants.

C. S. JELLEY,
GEORGE T. SIMPSON.

"Endorsed: Appearance for Ira B. Mills, Charles F. Staples and William E. Young. Entd. CR. "C" p. 109. Filed July 1st, 1907. Henry D. Lang, Clerk."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

JULY 1.

This day come the defendants, Ira B. Mills, Charles F. Staples and William E. Young by E. T. Young, Thos. D. O'Brien, C. S. Jelley, Royal A. Stone & George T. Simpson, Solicitors on whose motion it is hereby ordered that the appearance of said defendants be and the same is hereby entered.

Ent'd C. R. "C" p. 109.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Appearance.

The Clerk will enter my appearance for J. Rumsey Reeve, one of the defendants in the above entitled cause.

WILLIAM C. BICKNELL,
Solicitor for said Defendant, Morris, Minn.

"Endorsed: Appearance of J. Rumsey Reeve by William C. Bicknell, Morris, Minn. En'r'd CR "C" p. 109. Filed July 1st, 1907. Henry D. Lang, Clerk."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

JULY 1.

This day comes the defendant J. Rumsey Reeve, by William C. Bicknell, Solicitor on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

Ent'd C. R. "C" p. 109.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY CO. ET AL., Defendants.

Appearance.

The clerk will enter our appearance for the Defendant O. J. Whiteman in the above entitled matter.

FRANK T. WHITE,
GEO. H. TYLER,
Solicitors for Defendant, O. J. Whiteman,
Elk River, Minnesota.

"Endorsed: Appearance for Defendant, O. J. Whiteman, by Frank T. White and Geo. H. Tyler, Elk River, Minn. Ent'd CR "C" p. 109. Filed July 1st, 1907. Henry D. Lang, Clerk."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

JULY 1.

This day comes the defendant, O. J. Whiteman, By Frank T. White and Geo. H. Tyler, Solicitors on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

Ent'd C. R. "C" p. 109.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Appearance.

The Clerk will enter our special appearance for Edward T. Young, one of the defendants in the above entitled cause, the said special appearance being only for the purposes of the motion to dismiss filed by said defendant.

ROYAL A. STONE,
THOMAS D. O'BRIEN,
Solicitors for said Defendant.

C. S. JELLEY,
GEORGE T. SIMPSON.

"Endorsed: Appearance for Edward T. Young, Ent. CR "C" p. 110, Filed July 1st, 1907. Henry D. Lang, Clerk."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

JULY 1.

This day comes the defendant, Edward T. Young, as specified in the praecipe this day filed therefor, by Royal A. Stone, Thos. D.

O'Brien, C. S. Jelley & George T. Simpson, Solicitors on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

Ent'd C. R. "C" p. 110.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY CO., EDWARD T. YOUNG, IRA B. MILLS ET AL.

Appearance.

The clerk will enter my appearance for the defendants, Ira B. Mills, Charles F. Staples, William E. Young and Edward T. Young.
St. Paul, Minnesota, September 16th, 1907.

F. H. PETERSON,
Solicitor for Ira B. Mills, Charles F. Staples, William E. Young and Edward T. Young.

"Endorsed: Appearance of F. H. Peterson for defendants Ira B. Mills, *et al.*, Entered CR B'k "C" page 117, Filed September 16th, 1907. Henry D. Lang, Clerk."

U. S. Circuit Court, District of Minnesota, Third Division.

Chancery Rule and Order Book.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY CO. ET AL.

SEPT. 16, 1907.

This day come the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young by F. H. Peterson, one of their solicitors on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered, and that the appearance of said F. H. Peterson as additional solicitor for said defendants be and the same hereby is entered.

Ent'd C. R. "C" p. 117.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

It is ordered that the hearing on the order to show cause heretofore made herein, why a temporary injunction should not issue in accordance with the prayer in the bill of complaint herein contained, be and the same is hereby continued to and until the 8th day of July, 1907, at ten (10) o'clock in the forenoon of that day.

That in the meantime, until the further order of the Court in the premises, the restraining order heretofore made herein, be and the same is hereby in all things continued.

The right is reserved to Edward T. Young to make any special appearance herein for himself or for defendants Ira B. Mills, Charles F. Staples and William E. Young, and any motion herein founded thereon at any time prior to the Rule day in July, 1907.

Dated St. Paul, Minn., June 7, 1907.

WM. LOCHREN, *Judge.*

"Endorsed: Order Continuing Hearing, Entered T. M. Vol. 36, page 50. Filed June 10th, 1907. Henry D. Lang, Clerk."

Circuit Court of the United States, District of Minnesota, Third Division. In Equity.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Motion to Dismiss as to Edward T. Young.

Comes now the defendant, Edward T. Young, the Attorney General of the State of Minnesota, and, appearing specially and only for the purpose of this motion, and not otherwise submitting to or acknowledging the jurisdiction of this Court in the premises, and expressly averring that the State of Minnesota has not and does not consent to the commencement of this action in manner and form as herein attempted or otherwise, moves this Honorable Court to dismiss as to him the bill of complaint filed in the above entitled cause, and for the ground of this motion shows—

That it appears by the said bill that the same is exhibited by the complainants against this defendant as, and only as, the Attorney

General of the State of Minnesota, and that the relief sought and prayed for therein is the restraint of him, the said Edward T. Young as Attorney General aforesaid, by writ of injunction from proceeding in his official capacity, and not otherwise, and in the exercise of an executive discretion thereby vested in him, to commence the appropriate action or actions in the name of and on behalf of the said State of Minnesota, thereby restraining the State of Minnesota from proceeding by appropriate action or actions to enforce certain of its laws or to test the validity of the said laws, the said suit being, therefore, in truth and in effect a suit against the said State of Minnesota as a party defendant, commenced against it without its consent, contrary to the Eleventh Amendment of the Constitution of the United States.

Wherefore, this defendant separately demands the judgment of this Honorable Court that the said bill of complaint be dismissed as to him.

EDWARD T. YOUNG.

ROYAL A. STONE,
GEORGE T. SIMPSON,
C. S. JELLEY,
THOMAS D. O'BRIEN,
Solicitors for said Defendant.

"Endorsed: Motion to Dismiss as to Edward T. Young. Filed July 1st, 1907. Henry D. Lang, Clerk."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Now comes Edward T. Young, one of the defendants above named, appearing specially and only in response to the Order to Show Cause why a temporary injunction should not issue as prayed for herein, and for cause why such temporary injunction should not issue as to him, shows—

That it appears by the Bill of Complaint exhibited herein, that the same is exhibited by the complainants against this defendant as, and only as the Attorney General of the State of Minnesota, and that the relief sought and prayed for therein is the restraint of him, the said Edward T. Young, as Attorney General aforesaid, by Writ of Injunction; from proceeding in his official capacity, and not otherwise, and in the exercise of an executive discretion thereby vested in him, to commence the appropriate action or actions in the name of and on behalf of the said State of Minnesota thereby restraining the State of Minnesota from proceeding by appropriate

action or actions to enforce certain of its laws or to test the validity of the said laws, the said suit being therefore, in truth and effect, a suit against the said State of Minnesota as a party defendant, commenced against it without its consent, contrary to the Eleventh Amendment of the Constitution of the United States.

Wherefore, this defendant prays that the said Order to show cause be discharged.

EDWARD T. YOUNG.

THOMAS D. O'BRIEN,
GEORGE T. SIMPSON,
C. S. JELLEY,
R. A. STONE,
Solicitors for said Defendant.

"Endorsed: Motion to Dismiss Temporary Injunction as to Edward T. Young. Filed July 8th, 1907. Henry D. Lang, Clerk."

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Now come the above named defendants Ira B. Mills, Charles F. Staples and William E. Young and reserving their right to make such further and other showing and proof as they may hereafter be advised is necessary and proper, pray this Honorable Court that at this time the rule and order to show cause heretofore issued to and served upon them in the above entitled cause be discharged as to these defendants upon the grounds and for the reasons that it is manifest:

I.

That no facts are stated in the bill of complaint exhibited by said complainants sufficient to show that they are entitled to any relief as against these defendants, whether as prayed in said bill or otherwise.

II.

That in said bill several distinct and separate matters are attempted to be alleged, as to several of which these defendants are in no way connected and in others of which some of the other defendants are in no way interested or connected and said several matters are so separate and distinct and the rights and interests of the defendants do different that the said matters and the said defendants cannot be properly joined in one action.

III.

That it manifestly appears by said bill that the same is exhibited against these defendants in their official capacity as members of and constituting the Railroad and Warehouse Commission of the State of Minnesota, and inasmuch as the relief sought against these defendants is to restrain their official action, the same is in effect and in truth a suit against the State of Minnesota and against its objection.

IV.

That it appears from said bill that these defendants' duties are and have been fully performed with reference to any proceedings by them concerning the order of the Railroad and Warehouse Commission of September 6th, 1906, attempted to be described in said bill, that the rates prescribed by said order are in full force and effect, by the voluntary act of the defendant railroad company, and constitute the only legal rates which may be charged for the transportation of the merchandise described in said order between stations in the state of Minnesota, and no other or different rates can be fixed except in the manner provided by the statutes of the State of Minnesota in that behalf enacted.

V.

That it appears from said bill of complaint that these defendants do not contemplate or threaten to take any action or proceeding with reference to the order of September 6th, 1906, or the acts of the Legislature of the State of Minnesota referred to in said bill.

VI.

That the statutes of the State of Minnesota, defining the powers and duties of the Railroad and Warehouse Commission, provide no penalty for failure to obey the orders of said Commission and the only method of enforcing compliance with an order of said commission is by a proceeding in mandamus in the District Court of Minnesota, and this Court will not make an order in restraint of such proceedings.

Wherefore these defendants pray that without any other or further showing of cause upon their part said rule and order be discharged as to them.

IRA B. MILLS,
CHARLES F. STAPLES,
WILLIAM E. YOUNG,
Defendants.

EDWARD T. YOUNG,
GEORGE T. SIMPSON,
ROYAL A. STONE,
THOMAS D. O'BRIEN,
S. S. JELLEY,
Solicitors for these Defendants.

"Endorsed: Motion to Discharge Restraining Order, as to Railroad & Warehouse Com. Filed July 8th, 1907. Henry D. Lang, Clerk."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Motion to Discharge Restraining Order.

Now comes the defendant O. J. Whiteman, and reserving his right to make such further and other showing and proof as he may be advised is necessary and proper, prays this Honorable Court that at this time the rule and order to show cause heretofore issued to and served upon him in the above entitled cause, be discharged as to him, upon the ground and for the reason that it is manifest

I.

That no facts are stated in the bill of complaint filed by said complainants, sufficient to show that they are entitled to any relief as against this defendant, whether as prayed in said bill or otherwise.

II.

That in said bill several distinct and separate matters are attempted to be alleged as to several of which this defendant is in no way connected and in others of which some of the other defendants are in no way interested or connected, and said several matters are so separate and distinct and the rights and interests of the defendants so different, that the said matters and the said defendants cannot be joined in one action.

Wherefore, this defendant prays that without any other or further showing of cause *of cause* upon his part said rule and order be discharged as to him.

O. J. WHITEMAN,
Defendant.

FRANK T. WHITE AND
GEO. H. TYLER,
Solicitors for O. J. Whiteman, said Defendant
Elk River, Minn.

"Endorsed: Motion to Discharge Restraining Order as to O. J. Whiteman. Filed July 8th, 1907. Henry D. Lang, Clerk."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Motion to Discharge Restraining Order.

Now comes the defendant J. Rumsey Reeve, and reserving his right to make such further and other showing and proof as he may be advised is necessary and proper, prays this Honorable Court that at this time the rule and order to show cause heretofore issued to and served upon him in the above entitled cause, be discharged as to him, upon the grounds and for the reasons that it is manifest—

I.

That no facts are stated in the bill of complaint filed by said complainants, sufficient to show that they are entitled to any relief as against this defendant, whether as prayed in said bill or otherwise.

II.

That in said bill several distinct and separate matters are attempted to be alleged as to several of which this defendant is in no way connected and in others of which some of the other defendants are in no way interested or connected, and said several matters are so separate and distinct and the rights and interests of the defendants so different, that the said matters and the said defendants cannot be joined in one action.

Wherefore, this defendant prays that without any other or further showing of cause upon his part said rule and order be discharged as to him.

J. RUMSEY REEVE, *Defendant.*

WILLIAM C. BICKNELL,
Solicitor for said Defendant.

"Endorsed: Motion to Discharge Restraining Order as to J. Rumsey Reeve. Filed July 8th, 1907. Henry D. Lang, Clerk."

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

JULY 8TH 1907.

Monday Morning.

Court opened Pursuant to adjournment.
Present: Hon. William Lochren, Judge; Henry D. Lang, Clerk.

* * * * * * *

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

This day come the parties to this cause by their respective solicitors and the motion of the defendant Edward T. Young, for a dismissal of the bill of complaint filed in the above entitled cause as to him for the reasons therein stated, now coming on to be heard, Mr. Edward T. Young appears specially for himself for the purpose solely of said motion and argues the same on his behalf and Mr. Jared How appears for and argues in opposition thereto on behalf of the complainants.

And after hearing the arguments and statements of the solicitors for the respective parties hereto upon the said motion, it is by the Court ordered that the same be and it hereby is denied.

An exception is prayed on behalf of the said defendant to the said order denying the said motion and is allowed.

This day come the parties to this cause by their respective solicitors, Mr. Jared How appearing on behalf of the complainants and Messrs. Edward T. Young, Royal A. Stone, Thomas D. O'Brien, C. S. Jelley and George T. Simpson, appearing on behalf of the defendants Ira B. Mills, Charles F. Staples and William E. Young, and the motion of the aforesaid defendants for a dismissal of the order to show cause heretofore issued and served upon them and returnable at this time and place, now coming on to be heard, the same is argued by the solicitors for the respective parties hereto and after hearing the arguments and statements of counsel thereon and being fully advised in the premises, after due consideration thereof it is by the Court ordered that the said motion be and the same hereby is denied.

An exception is prayed on behalf of the said defendants to the said order denying said motion and is allowed.

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

JULY 8TH, 1907.

This day come the parties to this cause by their respective solicitors, Mr. Jared How appearing on behalf of the complainant and Edward T. Young, Royal A. Stone, Thomas D. O'Brien, C. S. Jelley and George T. Simpson, appearing on behalf of the defendant Edward T. Young, and C. W. Bunn, appearing on behalf of the Northern Pacific Railway Company, and the order to show cause heretofore issued returnable at this time and place why a temporary injunction should not issue as therein prayed for, now coming on to be heard the same is presented to the Court solely upon the question as to whether or not if it should be determined upon a final hearing upon this order to show cause that a temporary injunction shall issue, whether or not the same shall include the defendant Edward T. Young.

Mr. Jared How argues upon said order to show cause on behalf of the complainants.

Mr. Royal A. Stone argues in opposition thereto on behalf of the defendant Edward T. Young.

And here the Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Royal A. Stone resumes and concludes his argument upon the said order to show cause on behalf of the defendant.

And the hearing of said order to show cause not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1906.

JULY 9TH, 1907.

Tuesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge; Henry D. Lang, Clerk.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

This day come again the parties to this cause by their respective solicitors and the hearing upon the order to show cause heretofore duly issued why a temporary injunction should not issue as prayed for against the defendants and each of them which comes on at this time solely upon the question as to whether or not if it shall be considered by the court upon a final showing upon this order to show cause that an injunction shall issue, whether or not the same shall include the defendant Edward T. Young, is resumed and continued as follows, to-wit:

Mr. Jared How, argues said order to show cause on behalf of the complainants.

Mr. Thomas D. O'Brien argues in opposition on behalf of the defendant Edward T. Young.

Mr. C. W. Bunn argues upon said order to show cause on behalf of the defendant Railway Companies.

Mr. Thomas Wilson argues further upon said order to show cause on behalf of the defendant Railway Companies.

Mr. Edward T. Young argues further upon said order to show cause on his own behalf.

And here the Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Edward T. Young resumes and concludes his argument upon said order to show cause on his own behalf.

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

JULY 9TH, 1907.

Mr. Jared How argues in reply and conclusion upon said order to show cause on behalf of the complainants.

And after hearing the arguments and statements of the solicitors for the respective parties hereto thereon and being fully advised in the premises, upon due consideration, it is by the Court ordered that if upon a final hearing of the order to show cause why a temporary injunction should not issue as therein prayed for it shall be determined that such injunction shall issue the same shall include the defendant Edward T. Young.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk.*

Circuit Court of the United States, District of Minnesota, Third Division.

857.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

This day come the parties to this cause by their respective solicitors, How, Butler and Mitchell, and Edward S. Robert appearing on behalf of the complainants, Mr. C. W. Bunn appearing on behalf of the defendant the Northern Pacific Railway Company, and Messrs. E. T. Young, Thomas D. O'Brien, Royal A. Stone, C. S. Jelley and George T. Simpson appearing for the defendants Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young, and the same now coming on for hearing upon the application of the complainants for a temporary injunction herein:

By consent of all parties in open court,—

It is ordered, That the hearing upon the rule to show cause, issued herein May 31st, 1907, be continued until September 3rd, 1907, at 10 o'clock A. M.

It is further ordered that in the meantime and until the further order of this Court in the premises, the restraining order issued in and made part of the order to show cause issued May 31st, 1907, and all the provisions thereof shall be and the same are hereby in all things continued in full force and effect.

It was agreed between the parties as follows:

That complainants may, if so advised, serve additional affidavits in support of the application for temporary injunction on or before the 23rd day of July, 1907.

That the defendants shall answer or demur on or before the rule day in August.

That all affidavits in opposition to complainants' affidavits shall be filed and copies served on complainants' attorneys at least ten days before the date to which said hearing is continued aforesaid.

That any defendant who shall demur shall serve upon complainants' counsel at least ten days before the date to which said hearing is continued, a copy of the answer which said defendant will file in case the demurrer is overruled.

Now it is ordered, That the foregoing stipulations be and the same are hereby approved by the Court.

Dated July 16th, 1907.

By the Court.

WM. LOCHREN, *Judge.*

"Endorsed: Order Continuing Hearing on Order to Show Cause. Ent'd T. M. Vol. 36 P. 163. Filed July 16th, 1907. Henry D. Lang, Clerk."

United States Circuit Court, District of Minnesota, Third Division.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL., Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL., Defendants.

How, Butler & Mitchell, for complainants.
C. W. Bunn, for N. P. Ry. Co.
Edward T. Young, Thomas D. O'Brien, Royal A. Stone, C. S. Jelley, George T. Simpson, for Railroad & Warehouse Commission.

C. Equity. No. 858.

JOHN S. KENNEDY ET AL., Complainants,
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL., Defendants.

How, Butler & Mitchell, for complainants.
Wm. R. Begg, for G. N. Ry. Co.
Same appearances for Railroad and Warehouse Commission.
E. P. Peterson for defendants Palm & Larson.

C. Equity. No. 859.

JAMES T. WOODWARD ET AL., Complainants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants.

How, Butler & Mitchell for complainants.
F. W. Root, for C. M. & St. P. Ry. Co.
Same appearances for Railroad and Warehouse Commission.

C. Equity. No. 860.

CRAWFORD LIVINGSTON ET AL., Complainants,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL., Defendants.

How, Butler & Mitchell, for complainants.
Samuel A. Lynde, for C. & N. W. Ry. Co.
Same appearances for Railroad & Warehouse Commission.

C. Equity. No. 861.

GEORGE S. BREWSTER ET AL., Complainants,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY ET AL., Defendants.

How, Butler & Mitchell, for complainants.
Thomas Wilson for C. St. P. M. & O. Ry. Co.
Same appearances for Railroad & Warehouse Commission.

C. Equity. No. 862.

WILLIAM SHILLABER, Complainants,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL., Defendants.

How, Butler & Mitchell, for complainants.
George W. Seevers, for M. & St. L. Ry. Co.
Same appearances for Railroad and Warehouse Commission.

C. Equity. No. 863.

JOHN HUMBIRD, Complainant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL., Defendants.

Stiles W. Burr, for complainant.
Asa G. Briggs, for C. G. W. Ry. Co., *et al.*
Same appearances for Railroad & Warehouse Commission.
C. Louis Weeks, for C. H. Tripp.

C. Equity. No. 864.

FREDERICK C. BARROWS, Complainant,
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL., *Complainants.*

John F. McGee, for complainant.
Alfred H. Bright, for M. St. P. & S. Ste. M. Ry. Co.
Same appearances for Railroad & Warehouse Commission.
R. J. Stromme for E. Sauby.

C. Equity. No. 865.

JOHN J. CARLE, Complainant,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

How, Butler & Mitchell for complainants.
McNeil V. Seymour for C. R. I. & P. Ry. Co.
Same appearances for Railroad & Warehouse Commission.
C. Louis Weeks for E. B. Swygart.

This cause came on for hearing before Honorable William Lochren, United States District Judge for the District of Minnesota, at the Federal Building, Saint Paul, Minnesota, on the eighth day of July, A. D. 1907.

The parties being present by their respective solicitors, the cause is fully argued and heard.

Whereupon, the court being duly advised in the premises, renders the following decision orally:

LOCHREN, *J.* (Orally):

The question now before the court is as to whether or not in case temporary injunction shall issue in these cases the same should include the name of Edward T. Young as Attorney General of this state; and that presents the question as to whether or not the rates as established by legislative enactment and authority are unconstitutional and amount to the taking of the property of the railway companies without due process of law. It is alleged in the bills of each case that the several stockholders complainants have applied to the officers of their respective railroad companies, asking them to take proceedings for the preservation of the alleged rights of the stockholders, and that the railroad companies through their officers have refused or declined to do so; therefore the stockholders having no one to represent them, and owning stock in the railroad companies, and being interested in the welfare of the companies *and* have been obliged to bring these suits themselves.

I apprehend there is no doubt that while a railroad company is represented by its officers, the stockholders ordinarily are not permitted to proceed by themselves to protect the rights of the corpora-

tion; but where a corporation by its officers refuses to take proper action to protect its property, the stockholders themselves, as a matter of necessity, are empowered to take such action. I think this view is upheld by the many similar cases referred by counsel in *this* argument. The claim of the Attorney General is that these actions seeking to enjoin him are really suits against the state; that the state is the real party attempted to be proceeded against; and the eleventh amendment to the Constitution of the United States is referred to, which forbids a suit in law or equity against a state by a citizen of another state or by a citizen or subject of a foreign state.

There is no doubt that this goes to the extent claimed of forbidding any suit of that kind from being brought in a federal court. There are other provisions also in the Constitution to be considered like that in the Fourteenth Amendment referred to, that no state shall interfere, deprive any person of life, liberty or property without due process of law. That is a provision which the courts must see is made effective, as well as the other. It is a provision which applies to a state. A state is not allowed to take private property without due process of law; and it is well settled with reference to public service corporations, that where the rates of compensation for their services are fixed by state legislatures or administrative bodies acting under the authority of state legislatures, and those rates are made so low as not to be compensatory and not allow the business to be carried on at a fairly remunerative rate, then in fact private property is taken without due process of law; and any law to that effect, or any order of an administrative body to the same effect is unconstitutional; and a party must necessarily have some relief against wrongful acts of that kind. He must have the right to apply to the courts with the full expectation and certainty, in a proper case, of finding proper relief. Such a law or order if it does not afford proper compensation for the services that are required of these corporations, does in fact become confiscatory, and is for that reason unconstitutional. It confers no authority upon any one who attempts to enforce it, and therefore courts step in by their equity powers of injunction to prevent attempts to enforce such enactment or order. If an officer of the state attempts to enforce such an enactment or order he has no protection in law for such action; he cannot be protected while acting under an unconstitutional law by the mere fact that he is an officer of the state which state has enacted or attempted to enact that same law.

It was claimed in the argument yesterday by the Assistant Attorney General that one of the purposes of that office is to test this constitutional question and to bring an action in the state court so that it may be determined whether the law is enforcible or not. Now the only action for which there is any provision that I have observed is by prosecution brought against either of the railroad companies or some of their agents or officials, in the nature of a criminal prosecution for disobedience to or failure to obey the law. It cannot be well claimed that the constitutionality of that law in a case of this kind can be decided in an action of that sort. If an action of that kind were brought in a state court, an action of a criminal nature, the

defense that the law was unconstitutional or confiscatory could not be made out in that court; nor could any proper remedy be granted. The presumption would be that the rates so fixed were reasonable. There is always a presumption in cases of that sort that the rates fixed by the legislature are reasonable. The court in the trial of a criminal case brought to recover penalties or fines, or seeking imprisonment of the party indicted would have no machinery or means to determine whether these rates were reasonable or unreasonable, or whether they went to the extent of confiscation or not. It will be a very difficult question for any court to determine, mixed as these rates are, with rates fixed by the interstate commerce commission respecting interstate traffic, whether they were reasonable. It would be a very complex question for any court to determine as to the effect of those local rates, whether they were confiscatory or not. That matter certainly could not be determined in a criminal action brought for an alleged violation of those laws. Therefore there can be no remedy afforded by any state court in this case on the question as to whether as claimed in these bills of complaint the law is actually confiscatory and therefore unconstitutional; and the railroad companies and stockholders, if denied a remedy in this court, would be without remedy, they would be remediless; and the provision of the Constitution which is intended to protect persons in the ownership of property as against a state would be rendered nugatory.

Now, with respect to whether the Attorney General should be included as a party in case the court should determine to grant an injunction. It seems to me that he must be so included, and if it should turn out that this law shall be held to be unconstitutional, it will be no protection to him. There is no other practical way to raise the question than by bringing a suit of this kind and making the Attorney General a party to it. There would be no purpose in going on with these actions if the Attorney General is left out. He is the person who it is alleged in the bills has threatened and is threatening to enforce these alleged unconstitutional rates; and if not enjoined of course he will be entirely free to proceed to enforce them. The one statute of the state which requires him in such a case to so proceed is Section 395 of the Statutes of Minnesota, and by that he is required in case he shall have evidence that a railway company has committed any offense against the laws of the state, or has failed to exercise its franchises, or misused or abandoned them, to commence a prosecution against the railroad company at once. It is not a matter that is left to his discretion as to whether he shall proceed or not; the statute requires him to do so. As far as the alleged offenses for violation of this act are concerned, it seems to me that the direction to the Attorney General is just as potent as if it were included in the act itself.

I think therefore that if the showing shall be such that it will appear to the court that an injunction should issue, then the Attorney General should be included in it; and that this is not within the decisions of the Supreme Court suit against the state, but against

the Attorney General as an officer charged with the enforcement of these acts which are claimed to be unconstitutional.

This is as far, perhaps, as I need go at the present time.

(Endorsed:) Opinion on motion to dismiss Order to Show Cause as to Edward T. Young, Att'y Gen'l. Filed July 16th, 1907. Henry D. Lang, Clerk.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Order Allowing Amendments to Bill of Complaint.

Upon motion of How, Butler & Mitchell.

Ordered, that the complainants have leave forthwith to file the attached amendments to their Bill of Complaint, without prejudice to the restraining order, and order to show cause heretofore issued, or to any other proceedings heretofore had. Fair copies of the amendments shall be forthwith furnished to the defendants without cost, and answers, motions, pleas or demurrers heretofore interposed may stand as answers, motions, pleas or demurrers upon the Bill as amended.

WM. LOCHREN, *Judge.*

Dated August 3rd, 1907.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Amendments to Bill of Complaint.

Now come the complainants above named, and amend the Bill of Complaint heretofore filed in said cause, in the following particulars:

1. In paragraph XI of said Bill of Complaint, strike out that part of said paragraph commencing with the words "prior to the institution of this suit," down to the end of said paragraph, and insert in lieu thereof the following:

"More than thirty days prior to the institution of this suit, and after the passage of said acts, your orators demanded of the President and Managing Directors of the said Northern Pacific Railway Company, that they cease obedience to the said order of said Commission under date September 6, 1906, and that said rates prescribed in such respective acts should not be put into effect, and that said corporation, its officers and directors, institute proper suit or suits to prevent said rates from continuing or becoming effective, as the case may be, and to have said acts and said order, and each of them, declared illegal, that the said corporation, its President and directors, have positively declined and refused to comply with such demand of your orators, or any part thereof, that the reason why said President and directors so declined and refused to comply with such demand was not in any manner because they considered said proposed rates would yield a fair and just return upon the capital invested, or would not be confiscatory, but because by reason of the severity of the penalties prescribed for the violation of said acts and order they could not subject themselves and the property of the Railroad to the ruinous consequences which would inevitably result from failure on their part to obey the said laws and order, a result which no action by themselves, their stockholders or directors could possibly prevent. Your orators are advised and believe that the shareholders in the said Northern Pacific Railway Company are extremely numerous and widely scattered, living in this and many foreign countries, that it would have been impossible to procure a meeting of said shareholders within such time as would have been necessary in order that your Orators and other shareholders might have relief in the premises. This suit is not in any manner or to any extent a collusive one, to confer on the Court of the United States jurisdiction of a case of which it could not otherwise have cognizance."

2. After said paragraph XI insert the following:

"XI*a*. Your orators further allege that said Acts of April 4, 1907, and April 18, 1907, are, and each of them is, in the penalties prescribed for their violation, so drastic, that no owner or operator of railway property can invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employés, and for that reason your Orators allege that said Acts of April 4 and April 18, 1907, and each of said Acts, denies to the defendant Railway Company and its stockholders, including the complainant, the equal protection of the laws and deprives it, and them, of their property without due process of law, and are, and each of said acts is, for that reason, unconstitutional and void."

CHARLES E. PERKINS,
DAVID C. SHEPARD,
By WILLIAM D. MITCHELL,
Their Solicitor.

HOW, BUTLER & MITCHELL, AND
EDWARD S. ROBERT,
Solicitors for Complainants.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, William D. Mitchell, on oath say that I am one of the solicitors for the complainants in the above entitled Bill, that I have read the said Bill and know the contents thereof, and that the same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

WILLIAM D. MITCHELL.

Subscribed and sworn to before me this 3rd day of August, 1907.

[NOTARIAL SEAL.] ELEANOR TIGHE,
Notary Public, Ramsey County, Minn.

My commission expires Sept. 25, 1908.

"Endorsed: Order and Amendments to Bill of Complaint, Order ent. TM Vol. 36, p. 173. Filed August 5th, 1907. Henry D. Lang, Clerk, By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. In Equity.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Demurrer.

Demurrer of Ira B. Mills, Charles F. Staples, and William E. Young.

Now come the above named defendants, Ira B. Mills, Charles F. Staples and William E. Young, jointly with each other but separately so far as concerns any of the other defendants named in said bill, and by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:—

I.

That said bill herein filed does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated in said bill, sufficient to entitle the complainants to any relief against these defendants.

And these defendants for special grounds of demurrer further show.

II.

That it appears by the said bill that the same is exhibited against these defendants and the several other defendants therein named, for

distinct matters and causes, in several whereof, as appears by the said bill, these defendants are not in any manner interested or concerned, and that the said bill is altogether multifarious.

III.

That it appears by the said bill that the same is exhibited against these defendants as, and only as, members of and constituting the Railroad & Warehouse Commission of the State of Minnesota, and that the relief sought as against these defendants, is the judicial restraint of the executive action of these defendants.

IV.

That it appears by the said bill, that in so far as the same is exhibited against these defendants, it is in truth and effect exhibited against the State of Minnesota, and that this suit is in truth and effect one against the State of Minnesota, and commenced against it without its consent, and that this Court therefore has no jurisdiction to entertain the same.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto, and humbly demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

IRA B. MILLS,
CHARLES F. STAPLES,
WILLIAM E. YOUNG,
Defendants.

E. T. YOUNG,
C. S. JELLEY,
GEORGE T. SIMPSON,
R. A. STONE,
T. D. O'BRIEN,
Solicitors for Defendants, Mills, Staples and Young.

I, R. A. Stone, one of the Solicitors for the Defendants, Ira B. Mills, Charles F. Staples and William E. Young, in the above entitled cause, Do Hereby Certify that the foregoing Demurrer, in my opinion, is well founded in law.

R. A. STONE, *Solicitor.*

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Ira B. Mills, one of the Defendants in the above entitled cause, and joining in the foregoing demurrer being duly sworn, do say, that the foregoing Demurrer is not interposed for delay.

IRA B. MILLS.

Subscribed and sworn to before me this 13th day of June, A. D. 1907.

[Notarial Seal, Ramsey County, Minnesota.]

THOS. YAPP,
Notary Public, Ramsey County, Minnesota.

My commission expires May 1st, 1913.

"Endorsed: Demurrer of Ira B. Mills, Charles F. Staples and William E. Young. Filed August 5th, 1907, Henry D. Lang, Clerk, By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Demurrer of Edward T. Young.

The Demurrer of the Defendant Edward T. Young.

Now comes the above named defendant, Edward T. Young, separately and by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto and for cause of demurrer shows:

I.

That said bill herein filed does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated in said bill sufficient to entitle the complainants to any relief against this defendant.

And this defendant for special grounds of demurrer further shows:

II.

That it appears by the said bill that this cause is in truth and effect a suit against the State of Minnesota commenced without its consent, and therefore in violation of the Eleventh Amendment to the Constitution of the United States.

III.

That it appears by the said bill that the same is exhibited against this defendant as, and only as, the Attorney General of the State of Minnesota, and that the relief sought as against this defendant, is the judicial control and restraint of the executive and discretionary action of this defendant in his official capacity aforesaid, and not otherwise.

IV.

That it appears by the said bill that the same is exhibited against this defendant and the several other defendants therein named, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant does demur thereto, and humbly demand the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

EDWARD T. YOUNG.

THOS. D. O'BRIEN,
GEORGE T. SIMPSON,
C. S. JELLEY,
R. A. STONE,
Solicitors for said Defendant.

I, R. A. Stone, one of the Solicitors for the Defendant Edward T. Young, in the above entitled cause, do hereby Certify that the foregoing Demurrer, in my opinion, is well founded in law.

R. A. STONE.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Edward T. Young, one of the defendants in the above entitled cause, being duly sworn, do say, that the foregoing Demurrer is not interposed for delay.

EDWARD T. YOUNG.

Subscribed and sworn to before me this 16th day of July, A. D. 1907.

[Notarial Seal, Hennepin Co., Minn.]

C. LOUIS WEEKS,
Notary Public, Hennepin County, Minnesota.

My commission expires May 17th, 1912.

"Endorsed: Demurrer of Edward T. Young. Filed August 5th, 1907. Henry D. Lang, Clerk. By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Demurrer of J. Rumsey Reeve.

Now comes J. Rumsey Reeve, one of the above named defendants, separately and by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

I.

That said bill herein filed does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated in said bill sufficient to entitle the complainants to any relief against this defendant.

And this defendant for special grounds of demurrer further shows:

II.

That it appears by the said bill that the same is exhibited against this defendant, and the several other defendants therein named, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

J. RUMSEY REEVE, *Defendant.*

WM. C. BICKNELL,
Solicitor for Defendant, J. Rumsey Reeve.

I, WM. C. Bicknell, Solicitor for Defendant, J. Rumsey Reeve, in the above entitled cause, Do Hereby Certify that the foregoing Demurrer, in my opinion, is well founded in law.

WM. C. BICKNELL, *Solicitor.*

STATE OF MINNESOTA, *County of Stevens, ss:*

I, J. Rumsey Reeve, one of the Defendants in the above entitled cause, being duly sworn, do say, that the foregoing Demurrer is not interposed for delay.

J. RUMSEY REEVE.

Subscribed and sworn to before me this 2nd day of August, A. D. 1907.

[W. J. Stewart, Notarial Seal, Stevens Co., Minn.]

W. J. STEWART,
Notary Public, Stevens County, Minnesota.

My commission expires June 25, 1909.

"Endorsed: Demurrer of J. Rumsey Reeve, Filed August 5th, 1907, Henry D. Lang, Clerk. By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Demurrer of O. J. Whiteman.

Now comes O. J. Whiteman, one of the above named defendants, separately and by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

I.

That said bill herein filed does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated in said bill sufficient to entitle the complainants to any relief against this defendant. And this defendant for special grounds of demurrer further shows:

II.

That it appears by the said bill that the same is exhibited against this defendant, and the several other defendants therein named, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

O. J. WHITEMAN, *Defendant.*

GEO. H. TYLER,
FRANK T. WHITE,
Solicitors for Defendant, O. J. Whiteman.

I, Geo. H. Tyler, Solicitor for Defendant, O. J. Whiteman, in the above entitled cause, Do hereby Certify that the foregoing Demurrer, in my opinion, is well founded in law.

GEO. H. TYLER, *Solicitor.*

STATE OF MINNESOTA, *County of Sherburne, ss:*

I, O. J. Whiteman, one of the Defendants in the above entitled cause, being duly sworn, do say, that the foregoing Demurrer is not interposed for delay.

O. J. WHITEMAN.

Subscribed and sworn to before me this 2nd day of August, A. D. 1907.

[Notarial Seal, Sherburne Co., Minn.]

CHAS. W. COATES,
Notary Public, Sherburne County, Minnesota.

My commission expires Jan. 1, 1913.

"Endorsed: Demurrer of O. J. Whiteman. Filed August 5th, 1907. Henry D. Lang, Clerk, by Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

It is hereby stipulated that the demurrers to the Bill of Complaint heretofore interposed herein shall be brought on for argument before the above entitled Court on the 3rd of September, 1907, in the same manner and to the same effect as if the same had been duly set down for argument according to the usual course of procedure.

DE FOREST BROTHERS,
HOW, BUTLER & MITCHELL,
Solicitors for Complainants.
GEORGE T. SIMPSON,
Solicitors for Demurrants.

"Endorsed: Stipulation. Filed August 30th, 1907. Henry D. Lang, Clerk, by Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Answer.

The joint and several answer of the defendants Ira B. Mills, Charles F. Staples and William E. Young to the bill of complaint of the complainants above named, respectfully shows:

These defendants now and at all times hereafter, saving and reserving unto themselves and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainants' said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or any of them to make answer unto, say:

I.

They admit the residence of the complainants as alleged in the complaint. That the defendant, the Northern Pacific Railway Company is a corporation organized under the laws of the State of Wisconsin. That the defendant Edward T. Young is a citizen of the State of Minnesota and is the Attorney General of said State. That these defendants are the members of and constitute the Railroad & Warehouse Commission of the State of Minnesota, and are residents of said State, and that the defendants Evert, Whiteman, Reeves and Michauds are residents of the State of Minnesota.

They admit that the defendant Railway Company is operating lines of railway as a common carrier of passengers and freight in and through the States mentioned in the bill of complaint herein.

II.

These defendants admit that the lines of railway operated by the defendant Railway Company are operated as one entire system and upon information and belief admit that the stock and bonds of said Company outstanding represent said whole system, they admit that a large part of the business of said defendant Railway Company is the transportation of interstate commerce, but these defendants deny that there is any necessary confusion or intermingling of the business transacted by said Railway Company, which is wholly local to each of the States in which it operates, with that which is interstate commerce, and allege that the amount and character of each, and the cost and productiveness of each, are entirely capable

of being segregated and ascertained, and that the same have been so segregated and ascertained as a matter of common practice amongst railroads for many years past.

III.

They believe and admit that the greater portion of defendant Railway Company's lines have been judiciously located but defendants have been informed and believe that certain of said lines have not been, and therefore they deny, and believe the denial to be true, that all of said defendant's said lines have been judiciously located and as to what portions and how much of said defendant's said lines have been judiciously located these defendants require proof, if the same be necessary.

IV.

They are informed and believe it to be true, that the par value of the stock and bonds outstanding on account of said defendant Railway Company's said lines is greatly in excess of the actual original cost of constructing and equipping the same, and much greater than the cost of reproducing the said lines and equipment would be, and much greater than the present value of the same, and that the original cost per mile of constructing and equipping that portion of said Company's lines within the State of Minnesota, is much less than the cost per mile as to the part of said lines which are without the State of Minnesota. That these defendants are unable to state the exact value of the said Company's property, either as to its whole line or as to that portion within the State of Minnesota, and ask that the complainants be required to present proof thereof.

V.

Further answering these defendants aver that prior to the 6th day of September, 1906, in their official capacity as aforesaid, they made an exhaustive investigation of the so-called merchandise rates charged by the defendant, the Northern Pacific Railway Company, and other Railroads in the State of Minnesota, for the transportation between points in Minnesota, of the merchandise of the kind, quality and class described in Exhibit 1 attached to the complainants' bill of complaint. Pursuant to the statute in such case made and provided, they conducted hearings in the courts of said investigation, due notice of the same having been given to the railway companies interested. That the defendant, the Northern Pacific Railway Company, duly appeared, answered and took part in said proceeding, and the Railroad & Warehouse Commission of the State of Minnesota then and there had full jurisdiction and authority, both of the subject matter of said investigation and of said defendant Northern Pacific Railway Company, for the purpose of conducting said hearing, receiving and considering the evidence adduced thereat, and fixing reasonable, just and equal rates for the transportation between stations in the State of Minnesota by common carriers, of merchandise of the kind and class described in Exhibit 1, and these defendants as members of and constituting said Commission, duly heard and gave

due consideration to the voluminous and comprehensive evidence, much of which was submitted by and on behalf of said defendant Northern Pacific Railway Company, and as a result of said investigation and their consideration of the evidence adduced therein, defendants constituting the Railroad & Warehouse Commission as aforesaid, on the 6th day of September, 1906, made the Order referred to and complained of in said bill of complaint, and in and by said Order fixed the schedule of rates in said bill of complaint referred to and complained of, and set forth in and by said Exhibit 1, which said Exhibit 1 is hereby admitted to be a true and correct copy of the Order made on said day, and schedule referred to in said Order of September 6th, 1906.

VI.

That defendants, in pursuance of their official duties in the premises, made said Order by reason of the fact that by the evidence adduced at said hearings, and by other competent and sufficient information, they were informed and convinced, and they now believe and allege, that the rates theretofore charged by said defendant Railway Company for the transportation of said commodities between stations in Minnesota, were on said September 6th, 1906, and theretofore, unequal, unjust, unreasonable and excessive, exacting from the public an unreasonable large sum for the services rendered and yielding to said Railway Company an unreasonably high return, in that said rates, together with said defendant company's other receipts from traffic local to Minnesota, produced a sum considerably more than sufficient to pay the cost of handling said traffic, together with a fair return on the value of the property devoted to the same.

VII.

That defendants, acting solely as the Railroad & Warehouse Commission of the State of Minnesota, were further induced to make the said Order by reason of the fact that after considering the evidence adduced at the said hearings, and other competent and sufficient information, they were informed and convinced, and now allege believing it to be true, that the rates so fixed by them in their said Order of September 6th, 1906, and the accompanying schedule, upon the merchandise and articles therein named, for the transportation of the same between points in the State of Minnesota, were then, and are now, in every respect, equal, just and reasonable as to the said defendant Railway Company, and the complainants herein as stockholders of said defendant Railway Company and of the other stockholders of said company, and defendants now aver that the said rates yield to said defendant Railway Company a fair return upon the present value of its property, including both its line and equipment used by it in said traffic between points in the State of Minnesota, as such value is, or may be ascertained, having due regard for the original cost of construction of said lines and other property, the amount expended in permanent improvements thereon, the amount and market value of said company's stocks and bonds, and the present as compared with the original cost of construction, the proba-

ble earning capacity of the property under said rates, and the sum required to meet the necessary and lawful operating expenses of said company, together with all other elements affecting the value of said property, which are proper to be considered.

VIII.

Further answering these defendants respectfully aver and submit, that the Orders of Sept. 6th, 1906 and May 3rd, 1907, and the said Act of April 18th, 1907, relate to and affect the carriage of freight exclusively within the State of Minnesota and between points therein, and that they do not purport to, nor do they in any manner, affect or burden interstate commerce, and these defendants deny that the existence or maintenance of the rates provided in said Orders and Act can in any manner affect, change or lower any other rate or rates maintained by said defendant Railway Company, which are just and reasonable, nor can the same constitute discrimination as to any other rate, if such rate is just and reasonable in itself nor effect, nor constitute discrimination as to any interstate rate maintained by defendant Railway Company whether the latter is reasonable or otherwise.

IX.

These defendants admit that if the said Orders of September 6th, 1906 and May 3rd, 1907, did not permit rates, or if either of the Acts of the Legislature set forth and complained of in said bill of complaint, did not in and of itself permit rates which would yield to defendant, Northern Pacific Railway Company, a return sufficient to pay the cost of the service required in transacting the business to which said rates are applicable, together with a fair return upon the value of the property devoted by said Company to said traffic, and the convenience and use of the public therein, the result of enforcing any such order or law and thereby compelling the defendant Railway Company to accept insufficient compensation for the service rendered, would be, as complainants allege, a confiscation of its property, a taking thereof without due process of law, and a denial as to said company and its stockholders of the equal protection of the law, and violative of the Constitution of the United States and especially the Fourteenth Amendment thereof.

Further answering these defendants allege, that the rates provided in and by said Order of Sept. 6th, 1906 are equal and just, and are more than adequate for the service performed, and that, after ample and full consideration of said rates by the defendant Railway Company, its officers, agents and directors, and as these defendants believe, by the complainants, the said rates were duly accepted, adopted and promulgated by said defendant Railway Company and went into full force and effect on or about the 15th day of November, 1906, and have ever since been maintained and used by said Company as its regular and duly published rates for the transportation of the merchandise described in Exhibit 1, between stations in the State of Minnesota, and no objection or protest was made against the same by the defendant Railway Company, these complainants, or

any other person, until the passage of the Acts of the Legislature mentioned in said bill of complaint and hereinafter referred to.

X.

That no application for permission to change or raise said rates has been made to the Railroad & Warehouse Commission of the State of Minnesota by the defendant Railway Company, or the complainants, or any other persons, since the same went into effect on November 15th, 1906.

XI.

These defendants admit that on the 3rd day of May, 1907, they duly made the Order referred to and described in said bill of complaint and attached thereto as Exhibit 2 thereof.

That as appears from said Order (Exhibit 2), the same is an extension of the terminal rates provided for in the Order of September 6th (Exhibit 1) to certain stations in the State of Minnesota, that the same considerations and conditions which entered into and controlled the validity of said Order of Sept. 6th, 1906, enter into and control said Order of May 3rd (Exhibit 2), except that the effect of said Order upon the revenues of said defendant Railway Company is comparatively much less than is the Order of Sept. 6th, 1906. All of the allegations hereinbefore contained with reference to the Order of September 6th (Exhibit 1) are applicable to and are hereby repeated as to said Order of May 3rd (Exhibit 2).

XII.

These defendants further aver, that, as provided by the statutes of the State of Minnesota, the defendant Railway Company had the right to appeal to the District Court of the State of Minnesota from the Orders of the Commission so entered on Sept. 6th, 1906, and May 3rd, 1907, within thirty days after the making thereof, that said District Court is a court of record and general jurisdiction, duly organized and existing under the Constitution and Laws of the State of Minnesota, and having and exercising all the powers of a court of chancery and a court of common law, as the same are known and recognized under our system of jurisprudence, and said Court is fully authorized and empowered to entertain and consider actions and defenses, both legal and equitable. That had such appeal been taken, the equality, justness and reasonableness of the rates heretofore maintained by said defendant Company, as well as those fixed by the Order of the Commission in said Orders of Sept. 6th, 1906, and of May 3rd, 1907, would have been for trial before said Court *de novo*, and upon such trial the order and findings of said Commission would have been only *prima facie* correct, that in said proceeding and upon said appeal all of the rights of said complainants would have been protected and every objection to the Orders of said Commission, and every consideration which might be urged in opposition thereto, which may, can or might be urged in this action, could and would have been considered by said District Court on said appeal. That as these defendants are informed and believe, no

demand was ever made by said complainants, or either of them, upon said defendant Railway Company, its officers, agents or directors, to appeal from the Orders of said Commission made and entered on Sept. 6th, 1906, and the 3rd day of May, 1907, or to take any step in relation thereto, to test the validity thereof, as provided by the laws of the State of Minnesota in that behalf enacted.

XIII.

These defendants admit that if no appeal had been taken from the Orders of said Commission, and if the defendant Railway Company had not itself adopted and published the Orders of said Commission hereinbefore referred to, nor have filed with said Commission its schedules of the rates and charges required by said Orders of said Commission, these defendants as such Commission, would have, except for the Order of this Court issued in this action, proceeded, upon the expiration of said time for appeal to publish and promulgate said Orders, as provided by the statutes of the State of Minnesota, and thereafter had the defendant Railway Company still refused to comply with said Orders, these defendants as such Commissioners would have demanded of the Attorney General of the State of Minnesota, that he commence an action by mandamus in said District Court, in the name of the State of Minnesota and upon the relation of these defendants, to the end that the judgment of said Court might be obtained directing and commanding the defendant Railway Company to comply with the terms and provisions of said Orders, that no other or different proceedings were ever contemplated, intended or threatened by these defendants, or so far as these defendants know, by any other person. That as these defendants are advised, the proceeding above described is the only proceeding which these defendants could take for the purpose of enforcing the Orders of the Commission dated Sept. 6th, 1906, and May 3rd, 1907, hereinbefore referred to, and that until the rendition of final judgment in said proceedings by mandamus, the defendant Railway Company, its officers, servants and agents, are subject to no fine or penalty, through, by or on account of said Orders whatever, nor is said Company in any manner subject to harrassing litigation of any kind or to a multiplicity of suits by reason thereof.

XIV.

That in the proceeding by mandamus hereinbefore described as contemplated by these defendants, the Orders of the Commission would be only *prima facie* correct, and the defendant Railway Company would have full and adequate means and opportunity to defend against the same, and to urge in such defense every consideration of law and equity, and every fact which the complainants might or could present to this Honorable Court on the trial of this action upon its merits. That said defendants are, as they are advised, confined to said proceedings by the statutes of the State of Minnesota, and that any other person attempting to *being* an action to compel the defendant Railway Company to comply with said Orders is confined to a like proceeding, and that it is not true that unless

this Court entertains this action and enjoins these defendants as prayed in the bill of complaint herein, that the complainants or said Defendant Railway Company will be compelled to defend their rights in a multitude of actions, and proceedings, or that they or it will be in any manner deprived of any defense, or even hampered in maintaining each and every defense which it may have to the Orders of the Commission entered Sept. 6th, 1906, and May 3rd, 1907, hereinbefore specified.

XV.

Further answering these defendants admit that on or about the 4th day of April, 1907, there was approved an Act of the Legislature of the State of Minnesota, entitled "An Act prescribing the maximum rate to be charged for the transportation of passengers upon railroads within the State of Minnesota, providing for the enforcement of the same and penalties for the violation thereof," and that a copy of said Act is attached to said bill of complaint marked Exhibit 6, and these defendants further admit that on or about the 18th day of April, 1907, there was approved an Act of the Legislature of the State of Minnesota, entitled "An act relating to railroad freight rates in the State of Minnesota, and defining certain duties of the Railroad & Warehouse Commission," a copy of which is attached to said bill of complaint marked Exhibit 4.

XVI.

These defendants aver that as provided by the statutes of the State of Minnesota, they have not, nor have either of them, any duty, official or otherwise, as members of the Railroad & Warehouse Commission, or otherwise, in connection with the maintenance or enforcement of said Acts of the Legislature, and they deny that they, or either of them, as members of said Railroad & Warehouse Commission, or otherwise, have contemplated or intended or threatened to bring any action or proceeding, or take any steps whatever, looking to the enforcement of the provisions of said Acts of the Legislature, and they aver that no application has ever been made to them, or either of them, by the complainants or by said Defendant Railway Company, its officers or agents, requesting the exercise by them of their right to modify or change any of the rates or charges provided for by said Acts of the Legislature.

XVII.

Further answering these defendants aver that for many years last past the rates charged by the defendant Railway Company for the transportation of passengers within the State of Minnesota, have been unequal, unjust and exorbitant, and that the rates and charges fixed and specified in said Act of the Legislature of April 4th, 1907, for the transportation of passengers within the State of Minnesota, are equal, just and reasonable, and if enforced the same will afford to the defendant Railway Company and its stockholders, an ample revenue to pay the necessary cost and expense of conducting said business, together with the proportion of the fixed charges of said defendant Railway Company properly chargeable to said passenger

service, and such proper proportion of all of the other legitimate and proper expenses of said defendant Railway Company chargeable thereto, and to yield to said Company and its stockholders, a fair and adequate return upon the value of the property invested in said business. And these defendants respectfully aver that the said Act of April 4th, 1907, relates to and affects the transportation of passengers exclusively within the State of Minnesota and between points therein, and that it does not purport to, nor does it in any manner, affect or burden interstate commerce, and these defendants deny that the existence or maintenance of the rates provided in said Act can in any manner affect, change or lower any other rate or rates maintained by said defendant Railway Company, which is, or are, just and reasonable, nor can the same constitute discrimination as to any other rate or rates, if such other rate or rates is or are just and reasonable in itself, nor effect, nor constitute discrimination as to any interstate rate maintained by the defendant Railway Company, whether the latter is reasonable or otherwise.

XVIII.

That prior to the 18th day of April, 1907, the rates and charges made by the defendant Railway Company for the transportation between stations within the State of Minnesota, of the commodities named in said Act of April 18th, 1907, were unjust, unequal and extortionate, and were much higher proportionately than the charges made by said Railway Company for the transportation of other freight upon its lines within the State of Minnesota and elsewhere. That the rates and charges fixed and provided by said Act of the Legislature of April 18th, 1907, are just, equal and reasonable as applied to said defendant Railway Company and its stockholders, and in truth and in fact are proportionately still higher than the rates and charges fixed by said Railway Company for like services in the transportation of other freight in the State of Minnesota and elsewhere, and that the rates and charges so fixed by said Act of the Legislature are sufficient to give to said defendant Railway Company and its stockholders, a revenue proportionately sufficient with its other revenues, to permit it to meet its operating expenses, fixed charges and all other proper and necessary expenses in connection with the operation of said Railway Company, and in addition thereto, a fair and adequate return upon the value of the property invested in the business of said Railway Company.

XIX.

Further answering these defendants aver, upon information and belief, that no sufficient demand was ever made by the complainants upon the defendant Railway Company, its officers or directors, requesting the institution of any legal proceeding in the name of the defendant Company, to test the reasonableness or validity of either of the Orders of the Railroad & Warehouse Commission or the Acts of the Legislature mentioned in said bill of complaint, and they aver upon information and belief, that this suit is wholly collusive, and is brought, not for the purpose of ascertaining in a speedy and

orderly manner the sufficiency of the rates and charges specified in said Orders and Laws, but for the purpose of hindering delaying and obstructing the public officers of the State of Minnesota, charged with duties in connection therewith, in the performance of such duties.

XX.

Defendants on their information and belief, deny that the expense of performing the service of transportation of local traffic between stations in the State of Minnesota is as great as the cost of handling and transporting such traffic in several other states through which said defendant's lines of railway run. Defendants further deny that the rates for intra-state business per mile of haul should be in all cases greater than the rates per mile upon interstate business, and allege that if such comparison is to be made in any case resort must be had to all the facts and circumstances surrounding the traffic in question.

Defendants admit that the defendant Railway Company's operating and other expenses have increased to some extent, as alleged in the bill of complaint, but on information and belief deny that the said expenses have increased to the extent therein alleged, and on this behalf defendants aver that said Company's operating expenses, both as to traffic local to the State of Minnesota, and its interstate traffic, and traffic in other states, for many years have been and now are, largely and unlawfully increased by unjustifiable and unauthorized expenditures of the funds of said Company for purposes not authorized by law or the charter of the defendant Railway Company, the exact amount or precise nature of such unauthorized expenditures being now unknown to the defendants.

XXI.

Further answering these defendants aver that the defendant Company's lines of railroad in the State of Minnesota are situated in a thriving and rapidly growing section of the State, and the volume of traffic upon said railway, particularly its passenger traffic, and in the commodities referred to in the Orders of said Commission of Sept. 6th, 1906 and May 3rd, 1907, and the Act of the Legislature of April 18th, 1907, will be necessarily greatly increased in the near future, that said freight commodities are of a class and character which enables them to be transported at a very slight cost, as compared with other classes of freight, but notwithstanding that, these defendants charge the fact to be that under the tariffs and charges heretofore maintained by the defendant Company, the freights named in said Orders and said Act of the Legislature were compelled to yield an unequal and unfair proportion of the entire earnings of said Company from the operation of its lines of road local to the State of Minnesota.

XXII.

These answering defendants admit that complainants' Exhibits numbered 3 and 5, are substantially true and correct statements of

the matters and things therein set forth and referred to, but allege on information and belief that the same are not in all respects true and in accordance with the facts, and that so far as the same may be material these defendants pray that complainants be required to make proof thereof.

XXIII.

Further answering these defendants deny that the juri*d*diction of this Court ought to have been, or can be invoked, in this cause, and they further deny that said complainants are entitled to the relief, or any part thereof, that their said bill of complaint demandeth.

These defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said bill of complaint, not admitting, however, that there is any other matter or thing in said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, true to the knowledge or belief of these defendants, or either of them, all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

IRA B. MILLS,
CHAS. F. STAPLES,
WILLIAM E. YOUNG,
Defendants.

E. T. YOUNG,
ROYAL A. STONE,
T. D. O'BRIEN,
GEORGE T. SIMPSON,
C. S. JELLEY,
Solicitors for Defendants.

"Endorsed: Answer of Ira B. Mills, Charles F. Staples and William E. Young. Filed Sept. 3d, 1907, Henry D. Lang, Clerk, By Louise B. Trott, Deputy."

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 3RD, 1907.

Tuesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

C. Equity. No. 857.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, CHARLES F. STAPLES, IRA B. MILLS, WILLIAM E. YOUNG, E. A. EVARTS, ACHILLE MICHAUD, O. J. WHITEMAN, J. RUMSEY REEVE, CHARLES MICHAUD and ADOLPH MICHAUD.

C. Equity. No. 858.

JOHN S. KENNEDY and HENRY F. DIMOCK
vs.
GREAT NORTHERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS, and S. S. GLARUM.

C. Equity. No. 859.

JAMES T. WOODWARD and WILLIAM WOODWARD and GEORGE GIBBS
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES and WILLIAM E. YOUNG.

C. Equity. No. 860.

CRAWFORD LIVINGSTON and JAMES T. WOODWARD
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES and WILLIAM E. YOUNG.

C. Equity. No. 861.

GEORGE S. BREWSTER and ROBERT S. BREWSTER

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

Equity. C. No. 862.

WILLIAM SHILLABER

vs.

MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

C. Equity. No. 863.

JOHN A. HUMBIRD

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, a Corporation; ALPHEUS B. STICKNEY, ANSEL OPPENHEIM, SAM C. STICKNEY, LEWIS S. CASS, WILLIAM E. PINCKNEY, JAMES P. ELMER, FREDERICK WEYERHAEUSER, JAMES W. LUSK, ROBERT C. WIGHT, H. E. FLETCHER, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, C. F. BERG, C. H. TRIPP, N. P. JOHNSON, THE NORTHWESTERN FUEL COMPANY, a Corporation; WESTERN ELEVATOR COMPANY, a Corporation; LAMPERT LUMBER COMPANY, a Corporation; HUBBARD MILLING COMPANY, a Corporation; WISCONSIN LUMBER COMPANY, a Corporation; THE SIMMONS MILLING COMPANY, a Corporation, and LAIRD NORTON COMPANY, a Corporation.

C. Equity. No. 864.

FREDERICK C. BARROWS

vs.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, PINE TREE LUMBER COMPANY, E. SAUBY, and OSBORN & MCMILLAN ELEVATOR COMPANY.

Equity. C. No. 865.

JOHN J. CARLE

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG, DANIEL L. BELL, E. B. SWYGART, and P. J. BOWLIN.

C. Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS, and S. S. GLARUM.

This day come the parties to the above entitled causes by their respective solicitors, Messrs. Jared How, Pierce Butler, Edward S. Robert, Robert Thorne, Stiles W. Burr, John F. McGee, appearing on behalf of the complainants and Messrs. Edward T. Young, Thomas D. O'Brien, Royal A. Stone, C. S. Jelley and George T. Simpson, appearing on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young, and C. W. Bunn appearing on behalf of the defendant Northern Pacific Railway Company, William R. Begg, appearing on behalf of the defendant Great Northern Railway Company, F. W. Root, appearing on behalf of the defendant Chicago, Milwaukee & St. Paul Railway Company, Samuel A. Lynde, appearing on behalf of the defendant Chicago and Northwestern Railway Company, Thomas Wilson appearing on behalf of the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, George W. Seever appearing on behalf of the defendant Minneapolis & St. Louis Railway Company, A. G. Briggs, appearing on behalf of the defendants Chicago Great Western Railway Company, A. B. & S. Stickney, Ansel Oppenheim, L. S. Cass, Wm. E. Pinckney, L. P. Elmer, F. Weyerhaeuser, J. W. Lusk, R. C. Wight and H. Fletcher, and Alfred E. Boyesen appearing on behalf of the defendant Northwestern Fuel Company, Alfred H. Bright appearing on behalf of the defendant Minneapolis, St. Paul, & Sault Ste Marie Railway Company, McNeil V. Seymour appearing on behalf of the defendant Chicago, Rock Island and Pacific Railway Company, and the same now coming on for hearing upon the orders to show cause heretofore issued in each of said causes, on the 29th and 31st day of May A. D. 1907, returnable on the 8th day of July A. D. 1907, and an order to show cause issued on the 19th day of August, A. D. 1907, returnable on the 3rd day of September A. D. 1907, and which said orders to show cause were on the 8th day of July A. D. 1907, and thereafter postponed and continued for hearing from time to time to this time and place, and now coming on to be heard, upon the agreement and consent of the solicitors for the respective parties to the above entitled causes, it is by the Court ordered that the affidavits heretofore filed on behalf of the respective parties thereto may be used in each of said causes so far as the same are applicable thereto and that the arguments to be made by the respective solicitors hereto may be considered as applying to all of said causes so far as the same are applicable thereto and to the individual causes represented by said solicitors so far as directed thereto.

Mr. Jared How thereupon opens states and argues said causes to the Court upon the said orders to show cause and application for a temporary injunction on behalf of the complainants.

Mr. Stiles W. Burr argues further upon the orders to show cause and application for a temporary injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Pierce Butler argues further upon the application for a temporary injunction and orders to show cause on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 4TH, 1907.

Wednesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge; Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary Injunction therein is resumed and continued as follows, to-wit:

Mr. Pierce Butler resumes his argument upon the order to show cause and application for *an* temporary Injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Pierce Butler resumes his argument upon the order to show cause and application for a temporary injunction on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

Ordered: That this Court do now adjourn until tomorrow morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 5TH, 1907.

Thursday Morning.

Court opened pursuant to adjournment.

Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

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Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the further hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Pierce Butler resumes and concludes his argument upon the order to show cau-e and application for a temporary injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Robert Thorne argues upon the order to show cause and application for a temporary injunction on behalf of the complainants.

And the hearing of said causes not being concluded at the houre

of adjournment it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

Ordered: That this Court do now adjourn until tomorrow morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk,*
By LOUISE B. TROTT, *Deputy.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 6TH, 1907.

Friday Morning.

Court opened pursuant to adjournment.

Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the further hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Robert Thorne resumes and concludes his argument upon the order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. John F. McGee argues upon said order to show cause and application for a temporary injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. John F. McGee, resumes his argument upon the order to show cause and application for a temporary injunction on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until Monday morning at Ten o'clock.

Ordered: That this Court do now adjourn until *tomorrow* morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk,*
By LOUISE B. TROTT, *Deputy.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 9TH, 1907.

Monday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 7870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. John F. McGee resumes and concludes his argument upon the order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. Stiles W. Burr, argues further upon the order to show cause and application for a temporary injunction, on behalf of the Complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Edward S. Robert argues upon said order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. Jared How argues further upon the order to show cause and application for a temporary injunction on behalf of the complainants.

And the hearing of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until to-morrow morning at ten o'clock.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk.*

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Order Allowing Amendment to Bill of Complaint.

Upon motion of How, Butler & Mitchell, and Edward S. Robert,

Ordered that the complainants have leave forthwith to file the attached amendments to their Bill of Complaint, without prejudice to the restraining order and order to show cause heretofore issued, or to any other proceedings heretofore had. Fair copies of the amendments shall be forthwith furnished to the defendants without cost, and answers, motions, pleas or demurrers heretofore interposed may stand as answers, motions, pleas or demurrers upon the Bill as amended.

WM. LOCHREN,
District Judge.

Dated September 10th, 1907.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Amendment to Bill of Complaint.

Now come the complainants above named, and amend the Bill of Complaint heretofore filed in said cause in the following particulars:

In Subdivision X by striking out the concluding paragraph reading as follows, to-wit:

"While the immediate effect of said order and of said Act, approved April 18th, 1907, if it could be confined to the State of Minnesota, might not be to take the property of said Railway Company without due process of law, yet if the principle upon which the tariffs are made, as above described, should be applied to the long haul interstate business of said company, and if the percentages of reduction effected by the said Orders and said Act should be applied to said Company's local business in other states (which is now being transacted upon rates fair and equal by comparison with said company's Minnesota rates prior to said Orders and said Act), they would operate to confiscate the railroad of said company, and to deprive it of property without due process of law, in violation of the Constitution of the United States, because such measure of reduction would leave said company without any net earnings whatever from its property."

And further by inserting in lieu thereof the following paragraph:

Your orators also show and allege that the said Orders of September 6, 1906, and May 3, 1907, and the said Act of April 18, 1907, and the reduction of the tariffs and charges of the said Railway Company therein and thereby prescribed, upon the merchandise and commodities specified therein respectively, are each and all of them unjust, unreasonable and confiscatory, and they, and each and all of them, would and will, if enforced, deprive your orators and the said Railway Company of their proper- without due process of law, and deprive them and it of the equal protection of the law, contrary to and in violation of the Constitution of the United States and the amendments thereof.

CHARLES E. PERKINS AND
DAVID C. SHEPARD,
By HOW, BUTLER & MITCHELL AND
EDWARD S. ROBERT,
Their Solicitors.

HOW, BUTLER & MITCHELL AND
EDWARD S. ROBERT,
Solicitors for Complainants.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Pierce Butler on oath says that I am one of the solicitors for the complainants in the above entitled Bill, that I have read the said Bill and know the contents thereof, that the same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

PIERCE BUTLER.

Subscribed and sworn to before me this 10th day of September, 1907.

[NOTARIAL SEAL.]

HENRY D. LANG,
Notary Public, Ramsey County.

My commission expires April 24, 1913.

"Endorsed: Order Allowing Amendment to Bill of Complaint, and Amendment. Order entd. T. M. Vol. 36, p. 239. Filed September 10th, 1907. Henry D. Lang, Clerk."

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 10TH, 1907.

Tuesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity: No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. C. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Jared How, argues further upon the order to show cause and

application for a temporary injunction on behalf of the complainants.

Stiles W. Burr, Esq., argues further upon said order to show cause and application for a temporary injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Stiles W. Burr, resumes and concludes his argument upon said order to show cause and application for a temporary injunction on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RY. CO. ET AL.

Order Allowing Amendment to Bill of Complaint.

Upon motion of How, Butler & Mitchell and Edward S. Robert,

Ordered that the complainants have leave forthwith to file the attached amendments to their Bill of Complaint, without prejudice to the restraining order and order to show cause heretofore issued, or to any other proceedings heretofore had. Fair copies of the amendments shall be forthwith furnished to the defendants without cost, and answers, motions, pleas demurrers heretofore interposed may stand as answers, motions, pleas or demurrers upon the Bill as amended.

Dated September 10th, 1907.

WM. LOCHREN, *Judge.*

Ordered that this Court do now adjourn until tomorrow morning at ten o'clock.

A true record,

Attest:

HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 11TH, 1907.

Wednesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER*n* ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Thomas D. O'Brien opens, states and argues upon said order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Thomas D. O'Brien resumes his argument upon said order to show cause and application for a temporary injunction on behalf of Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 12TH, 1907.

Thursday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.
By Louise B. Trott, Deputy.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Thomas D. O'Brien resumes his argument upon the order to show cause and application for a temporary injunction on behalf of the defendant, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Thomas D. O'Brien resumes his argument upon said order to show cause and application for a temporary injunction on behalf of Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

Ordered: That this Court do now adjourn until tomorrow morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk,*
By LOUISE B. TROTT, *Deputy.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 13TH, 1907.

Friday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Thomas D. O'Brien resumes his argument upon the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Thomas D. O'Brien resumes his argument upon the order to show cause and application for a temporary injunction on behalf of Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until Monday morning next at ten o'clock.

Ordered: That this Court do now adjourn until next Monday morning at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 16TH, 1907.

Monday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Thomas D. O'Brien resumes and concludes his argument upon the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

Mr. F. H. Peterson argues upon the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. F. H. Peterson resumes and concludes his argument on the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

Mr. Royal A. Stone argues upon said order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

On motion of Mr. Royal A. Stone, it is by the Court ordered that the appearance of Mr. F. H. Peterson as an additional solicitor on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young, be and the same hereby is entered of record.

* * * * * * *

A true record.
Attest:

HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 17TH, 1907.

Tuesday Morning.

Court opened pursuant to adjournment.

Present: Hon. William Lochren, Judge. Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Royal A. Stone resumes and continues his argument upon the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Royal A. Stone resumes and concludes his argument on the order to show cause and application for a temporary injunction on behalf of the defendants, Edward T. Young, Ira B. Mills, Charles F. Staples and William E. Young.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings be and they hereby are postponed and continued until tomorrow morning at ten o'clock.

* * * * * * *

Ordered: That this Court do now adjourn until tomorrow morning at ten o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 18TH, 1907.

Wednesday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge; Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Edward T. Young argues upon the order to show cause and application for a temporary injunction on behalf of himself and the defendants Ira B. Mills, Charles F. Staples and William E. Young.

Mr. Thomas Wilson argues upon the said order to show cause and application for a temporary injunction on behalf of the defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Robert Thorne argues in reply upon the said order to show cause and application for a temporary injunction on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until to-morrow morning at ten o'clock.

Ordered: That this Court do not adjourn until tomorrow morning at ten o'clock.

A true record.
Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 19TH, 1907.

Thursday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge, Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day comes again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. John F. McGee argues in reply upon the order to show cause and application for a temporary injunction on behalf of the complainants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

Mr. Edward S. Robert argues in reply upon the said order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. Pierce Butler argues in reply upon the order to show cause and application for a temporary injunction on behalf of the complainants.

And the trial of said causes not being concluded at the hour of adjournment, it is by the Court ordered that further proceedings herein be and they hereby are postponed and continued until to-morrow morning at ten o'clock.

Ordered: That this Court do now adjourn until tomorrow morning at ten o'clock.

A true record.
Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 20TH, 1907.

Friday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge, Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day comes again the parties to these causes by their respective solicitors and the hearing upon the order to show cause and application for a temporary injunction therein is resumed and continued as follows, to-wit:

Mr. Stiles W. Burr argues in reply upon the order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. Jared How argues in reply upon the order to show cause and application for a temporary injunction on behalf of the complainants.

Mr. T. D. O'Brien argues upon the order to show cause and application for a temporary injunction on behalf of the defendants.

The Court takes a recess until two o'clock P. M.

The Court resumes proceedings at two o'clock P. M.

And now having heard the argument and statements of the solicitors for the respective parties to the above entitled cause upon the said order to show cause and application for a temporary injunction, and being fully advised in the premises, upon due consideration thereof, the Court renders an oral decision, directing that the same be transcribed and filed and that the solicitors for the respective parties hereto prepare orders in accordance therewith to be signed, filed and entered.

Ordered: That the Court do now adjourn until Monday morning next at ten o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1907.

SEPT. 23RD, 1907.

Monday Morning.

Court opened pursuant to adjournment.
Present: Hon. William Lochren, Judge, Henry D. Lang, Clerk.

Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 858.

JOHN S. KENNEDY ET AL.
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

Equity. No. 859.

JAMES T. WOODWARD ET AL.
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL.

Equity. No. 860.

CRAWFORD LIVINGSTON ET AL.
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

Equity. No. 861.

GEORGE S. BREWSTER ET AL.
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL.

Equity. No. 862.

WILLIAM SHILLABER
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL.

Equity. No. 863.

JOHN A. HUMBIRD
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY ET AL.

Equity. No. 864.

FREDERICK C. BARROWS
vs.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY ET AL.

Equity. No. 865.

JOHN J. CARLE
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Equity. No. 870.

HENRY A. JAMES
vs.
GREAT NORTHERN RAILWAY COMPANY ET AL.

This day come the parties to these causes by their respective solicitors, and in accordance with the decision heretofore rendered and entered herein, it is by the Court ordered, that the demurrers of the defendants, and each of them, in the above entitled causes be and the same hereby are overruled, and that the said defendants in said causes, and each of them, other than the defendants Ira B. Mills, Charles F. Staples and William E. Young, have until the rule day in November within which to file their answers to the bills of complaint in said causes and each of them.

Equity. No. 857.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Upon motion by counsel for complainants, and upon reading affidavits in support and in opposition thereto, and after hearing counsel for complainants and for defendants,

This Court doth order that the defendant Northern Pacific Railway Company, its officers, directors, agents, servants and employés, and each of them, be restrained and enjoined pending the final hear-

ing of this cause, and until the further order of this Court in the premises, from publishing, adopting, or putting into effect the tariffs, rates or charges set forth in the Act of the Legislature of the State of Minnesota approved April 18, 1907, and entitled "An Act Relating to Railroad Freight Rates in the State of Minnesota, and Defining Certain Duties of the Railroad and Warehouse Commission," or any thereof.

That the defendant Edward T. Young, as Attorney General of said State of Minnesota be restrained and enjoined, pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said Act or either thereof, or to compel obedience to said Act or compliance therewith, or any part thereof.

That the defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and each of them, and all other persons, and each of them, from and after the time that they shall have knowledge of this Order, be restrained and enjoined pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting, or causing or advising to be instituted, any action, suit, step or proceeding for the violation of said Act, or from demanding that any of the rates contained therein be given to them, or either of them. Let a writ issue accordingly.

WM. LOCHREN, *Judge.*

Dated September 23rd, 1907.

* * * * * * *

A true record.
Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court, District of Minnesota, Third Division.

C. Equity. No. 857.

CHARLES E. PERKINS ET AL.
vs.
NORTHERN PACIFIC RAILWAY CO. ET AL.

And 858-859-860-861-862-863-864-865 and 870 C. Equity.

Decision on Application for a Temporary Injunction.

United States Circuit Court, District of Minnesota, Third Division.

C. Equity. No. 857.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, CHARLES F. STAPLES, IRA B. MILLS, WILLIAM E. YOUNG, E. A. EVARTS, ACHILLE MICHAUD, O. J. WHITEMAN, J. RUMSEY REEVE, CHARLES MICHAUD, and ADOLPH MICHAUD.

C. Equity. No. 858.

JOHN S. KENNEDY and HENRY F. DIMOCK

vs.

GREAT NORTHERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS, and S. S. GLARUM.

C. Equity. No. 859.

JAMES T. WOODWARD and WILLIAM WOODWARD and GEORGE GIBBS

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

C. Equity. No. 860.

CRAWFORD LIVINGSTON and JAMES T. WOODWARD

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

C. Equity. No. 861.

GEORGE S. BREWSTER and ROBERT S. BREWSTER

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMP. NY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

C. Equity. No. 862.

WILLIAM SHILLABER

vs.

MINNEAPOLIS & ST. PAUL RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG.

C. Equity. No. 863.

JOHN A. HUMBIRD

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, a Corporation; ALPHEUS B. STICKNEY, ANSEL OPPENHEIM, SAM C. STICKNEY, LEWIS S. CASS, WILLIAM E. PINCKNEY, JAMES P. ELMER, FREDERICK WEYERHAEUSER, JAMES W. LUSK, ROBERT C. WIGHT, H. E. FLETCHER, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, C. F. BERG, C. H. TRIPP, N. P. JOHNSON, THE NORTHWESTERN FUEL COMPANY, a Corporation; WESTERN ELEVATOR COMPANY, a Corporation; LAMPERT LUMBER Co., a Corporation; HUBBARD MILLING COMPANY, a Corporation; WISCONSIN LUMBER COMPANY, a Corporation; THE SIMMONS MILLING COMPANY, a Corporation, and LAIRD NORTON COMPANY, a Corporation.

C. Equity. No. 864.

FREDERICK C. BARROWS

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, PINE TREE LUMBER COMPANY, E. SAUBY, and OSBORN & MCMILLAN ELEVATOR COMPANY.

C. Equity. No. 865.

JOHN J. CARLE

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, and WILLIAM E. YOUNG, DANIEL L. BELL, E. B. SWYGART, and P. J. BOWLIN.

C. Equity. No. 870.

HENRY A. JAMES

vs.

GREAT NORTHERN RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, WALTER SCOTT, H. P. WEBB, JOHN PALM, L. LARSON, TOM GUNNESS, and S. S. GLARUM.

LOCHREN, *J.* (orally):

Gentlemen, I feel that it is a subject of congratulation that through this long-continued contest there has been such uniform courtesy displayed by counsel on both sides, not only towards the court, but towards each other. The cases have been fully and ably presented to the court, upon both sides. If circumstances permitted, I should be glad to give the cases further consideration than I feel myself able to. In view of the necessity of attending to other business, and especially in view of the fact that the October term in Minneapolis is coming on, I think it better that I dispose of the cases according to my first impressions than to detain them for further examination, which would hinder the ultimate settlement of the issues.

These suits have been brought by one or more stockholders of each of nine railroad companies doing business within the State of Minnesota, and each of them also engaged in interstate business, claiming that the rates fixed by the Railroad and Warehouse Commission, and which have been termed by counsel the "Merchandise rates," as well as the rates fixed by the legislature of the state by the act of April 4th of the present year (called the passenger rate law), and the rates also fixed by the legislature by the act of April 18th of the present year (Chapter 232 of the statutes of this year) are so low as to not afford adequate compensation to the railroad companies for the services that they are required to perform and a reasonable return upon the property which is invested by these railroad

companies, and used in the business, and therefore are confiscatory under the provisions of the constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, or deny equality under the laws; that the requiring of the railroad companies to do business at these rates would not afford adequate compensation, and are equivalent to taking their property without due process of law. These bills of complaint are met by demurrers upon various grounds, one of which is, that, being brought against the attorney general and other state officers, but especially the attorney general, they, in fact, amount to action brought against the state, which are prohibited, so far as the federal courts are concerned, by the eleventh amendment to the constitution of the United States. This matter I disposed of at a preliminary hearing, contrary to that contention, holding that although the state is interested in this matter, these suits are not, in terms nor in necessary effect, actions against the state. No property of the state is affected; no revenues of the state are affected, by the result of the litigation. And although the eleventh amendment to the constitution prohibits suits, or actions, against the state, by citizens of another state or of a foreign country, the fourteenth amendment provides that the state shall not deprive any person of life, liberty or property without due process of law. There must be some way to enforce that provision of the constitution. It is a provision which requires no action of congress to make it effective. It is a prohibition against the state. And if the state, by any act attempts to deprive anyone of life, liberty or property, without due process of law, the courts must provide some adequate remedy for the protection of such person. It would be a reproach to the courts did they fail to provide an adequate remedy in a case of that sort. And it is unnecessary in these cases to hold that the eleventh amendment would be ineffective as against the later provision, in the fourteenth amendment, if the remedy can be reached in another way; and it seems to me that it can—by tying the hands of the officers of the state, if necessary, in a proper action, and restraining them from attempting to enforce or put in effect a provision of the law of the state which is unconstitutional under the terms of the fourteenth amendment. This has been done in so many cases that it seems to me it does not now require argument to sustain that position. And I therefore hold that that ground of the demurrer is not well taken.

Another ground is that the bills are multifarious, in joining the Warehouse and Railroad Commission and the attorney general, because the acts complained of are separate and distinct acts and the acts of different bodies. The order of the Railroad and Warehouse Commission, of September 6th of last year, was promulgated by that commission under the authority of a legislative act; and, as has been decided in many cases, such an order has the same effect as a legislative act; that is, that the legislature has a right to empower administrative bodies to act in respect to this matter of rates and other matters of regulation concerning public corporations engaged in the business of transportation, so that its order has

the same effect as a legislative act. And the other two acts complained of are acts passed by the legislature. They all amount to legislation that has been put forth by the state. And it seems to me that complaints against all these acts may properly be joined in one action, and that the Railroad and Warehouse Commission have such charge in respect to the enforcement of these rates that they can properly be made defendants in an action of this kind, as well as the attorney general.

Another objection is that the bills do not show compliance with the 94th Equity Rule, such compliance being necessary to permit actions of this sort to be brought by stockholders, whereas, matters in which a corporation is concerned are properly under the management only of the officers and directors of the corporation, who should ordinarily be parties to an action to enforce corporate rights, and providing that such suit will not be allowed to be maintained by a stockholder unless it appears that he has first applied to the officers and directors of the corporation, demanding that they should enforce the rights which he complains are being infringed, and secure the safety of his property, the property being, of course ultimately the property of the stockholders, and only upon their refusal to do so will he be allowed to bring an action to protect himself. It seems to me that that has been done sufficiently in these cases. In every one of them an application has been made, either to the directors or to the controlling officers of the corporation whose duty it would be, in a proper case, if it was necessary, to call a meeting of the directors to act upon the matter, and either where the directors have met together or where the matter has been disposed of by the officers, the stockholders have been met with a direct refusal to take any action to protect the property against these alleged illegal attacks upon it. The reason alleged by the officers of the company and by the directors for not taking such action was, not that they doubted or denied the claim of the stockholders that this order and these acts were confiscatory, and null and void under the constitution, but that by the provisions of the acts themselves such severe penalties were denounced for any attempted violation of the acts, that they ought not to be called upon to incur the danger of those penalties, and would not assume that danger, and, for that reason, would not act in the matter. And it seems to me, in view of the severe penalties denounced by these acts of the legislature, that the officers of the corporations could not have done otherwise than to have refused to act under those circumstances, where their action would have laid them liable to severe penalties; and every subordinate who under their direction should attempt to violate these provisions, being also liable to like penalties, would also refuse. There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind. In case of the refusal to issue a ticket at a certain rate which is fixed by the legislature as proper, but which the railroad companies hold to be void and unconstitutional, (and which would be an act of

itself not immoral nor *malum in se*, but would ordinarily afford the person who was refused the privilege of a ticket a right of action against the railroad company,) in case he was in the right and the refusal was wrong, there would be no question but that in a civil action any such person would receive an adequate remedy; there would be no danger that any court or jury would refuse to give ample damages. Beyond question, the result of actions of that kind would be that the damages would almost certainly border on the excessive, instead of failing to remunerate the party for any wrong he would suffer on account of such a refusal. But under the provisions of these laws, acts not immoral or wrong in themselves, but which are only unlawful because prohibited, would entail upon the person refusing to comply with such laws the position of being convicted of a felony. They make the refusal a felony, and impose a punishment very unusual—a fine that might be to the amount of $5,000, or imprisonment in the state prison to the extent of five years, or both, in the discretion of the court; punishments which are applied only to the very highest crimes short of homicide of which men are ever guilty; punishments which would be deemed adequate in cases of burglary, highway robbery, or crimes of the highest character, short, as I say, of homicide. There is no doubt that the directors and officers of railroad companies were entirely justified in refusing to take the hazard that would fall upon them (and their employees, if they acted under their advice) by taking any steps to save the stockholders from the consequences of these laws.

I agree with counsel for the defendants that these matters must be considered separately. For instance, the order of the Commissioners of September 6, 1906, which went into effect on November 15th of the same year, must be considered by itself upon the charge that it did not afford adequate compensation to the railroad companies and had the effect of confiscating their property. If it did not have that effect, it would not have that effect if the subsequent acts added to it had that effect. And so with the act of April 4th—the passenger act. If that did not reduce the revenues of the companies to a degree which would leave them without sufficient compensation, even after the reducing effect of the order of the commissioners, then that would not be unconstitutional, it would be constitutional and proper. And the same remarks would apply to the act of April 18, which affected the rates chargeable upon commodities. It would have to be considered, of course, with reference to the reductions theretofore made by the two previous acts; but if that still left enough to compensate the railway companies for their services rendered in the transportation, and left an adequate return upon the value of the property which was used in the transportation within the state, the complainants would have no cause for complaint. But of course the latter act must be considered with reference to the reductions made in the earlier order and the earlier act. Now, I will not attempt—it would be impossible that I should do so—to go through with the different estimates that have been made in respect to the expenses of the railroads in the trans-

portation of freight and passengers, state and interstate, and what is applicable to the state properly.

It is argued that this court has not jurisdiction of the case because it does not raise any federal question, for the reason that there is no controversy as to the effect of the constitutional provision in the fourteenth amendment, that I have referred to, because it is admitted on the part of the defense that the construction claimed for that provision by the complainants is the true construction and that there is no controversy in relation to it, and that the only controversy arising upon this hearing is in relation to matters of fact alone. With respect to that, I might say that there is not really any controversy in respect to matters of fact, until we come to the ultimate facts in the case. There is no controversy as to what the order of the Railroad and Warehouse Commission actually was; there is no controversy as to the terms of that order or its effects upon the different articles of merchandise in respect to which it fixes the rates; there is no controversy in relation to the purport of the two different acts of the legislature to which I have referred; there is no controversy with respect to the showing which has been made by the railroad companies as to the cost of transportation, their operating expenses in the past, and the anticipated increase in those expenses in the present year; nor is there any controversy with respect to the amount invested in these railroad properties, in the first place,—there has been no attempt to show that they are different from what they are claimed to be in the showing made by the railroad companies themselves; nor with respect to the fixed charges, which are encumbrances upon these different properties, nor with respect to the amount of stock outstanding in these different companies. In relation to some of them, (the Chicago Great Western in particular) I believe that the evidence is that there are no outstanding bonds—anything which is usually reckoned by railroad companies as among their fixed charges; but it does appear that there are outstanding debentures, and that there are classes of preferred stock—several of them, each class in its order being allowed a certain amount of dividend before the next class in order would be entitled to any, and so on until we come to the common stock. And I am inclined to think that debentures of that kind, and preferred stock, which is entitled to dividends before anything goes to the common stock, are very much of the same nature as bonds or securities—which would be entitled to the payment of interest upon them before there would be any dividends on the preferred or common stock; that they are very much of the same character as these others which are reckoned under the head of fixed charges.

Now, the showings by the different railroad companies amount to this: That in the years past, including the year 1906, there was not enough revenue from the business carried on within the state, including business that was entirely local to the state and the share of the interstate business which would properly be chargeable to or applied upon the property of the railroad companies within the state, to entirely pay the fixed charges outstanding and

afford any adequate dividend or compensation to the owners of the stock itself—which represents the property—after paying all the operating expenses. And the showing was, in some cases, that there were no charges made, in the keeping of the accounts, under the head of or for or on account of depreciation in the road or rolling stock—the property of the company. It is evident that there ought to be a proper account under that head; that a railroad, like everything else, will wear out in time; and they have been used so long in this country that there can be a reasonable estimate of the percentage of loss each year from depreciation of the roadbed, culverts, bridges, rolling stock; and that it would be proper to lay aside a reasonable amount to furnish replacements, renewals and repairs when needed, and that if that was not done the railroad company might soon be in a position in which it could not keep up, with the receipts that it was getting, and maintain its property in an efficient state to render such service as the public is entitled to receive from it. Now this is a matter in which the public has an interest, as well as the railroad companies and the stockholders of the railroad companies. Some of us older men can remember, in the early days, about the time when the state was admitted, the great anxiety that the people of the state had at that time that railroads should be brought into the state; that persons having capital should be induced to bring railroads into the state; that it was necessary for the prosperity and the upbuilding of the state that it should have railroad connections with the rest of the world; and that great and successful efforts were made to get large subsidies, in the way of land grants, from congress; and that almost every community in the state, every village that had hopes of getting a railroad to it, counties, and all the municipalities were ready to vote, and did vote, bonds as subsidies, for the purpose of inducing men with capital to come into the state and build railroads. They could foresee that it was necessary for the advancement and prosperity of the state, to bring emigrants and others into the state, and change what at that time was a large waste into the sites of prosperous cities, thriving towns and villages and farms, and therefore to have railroads built giving them connection with the rest of the world; that there should be a way to take farm products, grain, cattle, hogs, everything that was produced by the farmer, in the quickest manner to the best market, and to bring into the state commodities that were needed by its people. And that was done. Railroads were built. We have them. We see the effect of the railroads. And I think every one will admit that no institutions that we have had in the state have done so much to bring about the present state of prosperity, upbuild cities and cover the state with prosperous farms and with a large population, as the railroads. And it would certainly be a very great calamity if these railroads were dealt with in such a way as to destroy their efficiency and usefulness to the inhabitants of the state. But notwithstanding this, there is, of course, a danger that the mass of the people, looking upon these large aggregations of wealth, seeing occasionally a person who is reputed to be or

who has become wealthy on account of his connection with these railroads, and that they are getting considerable amounts of money from the people of the state as compensation for the services that they are performing, will manifest a disposition to reduce this compensation; to save to the people a certain amount of what they have to pay when they patronize the railroads as passengers, or have commodities of any kind to ship upon the railroads. It is quite natural that they should want to have those charges reduced to the lowest point, at any rate, which would be consistent with keeping up the efficiency of the railroads and the advantages which they are receiving from them. There is a danger that this feeling of selfishness may lead them too far, and reduce this compensation so much that it will not enable the railroads to serve them with efficiency—to keep up their roadbed, culverts, bridges and everything so that they will be entirely safe for the transportation of passengers and freight, and to keep the rolling stock in the best state of efficiency, and enable them to provide the best service attainable. And that is exactly what those corporations are required to do; they are required to exercise the highest degree of care in relation to the transportation of passengers, and a high degree of care in relation to the transportation of freight, and it is certainly for the interests of the people that they should be enabled to do this; and it would be a very short-sighted policy which would reduce the compensation of these railroads to a degree that would disable them from performing these services fully and fairly for the benefit of the people.

A question has been raised in the case that these rates fixed by the Railroad and Warehouse Commission and by the legislature trench upon the authority of congress under the commerce clause of the constitution, which gives to congress the entire control and regulation of commerce among the states and with foreign nations and the Indian tribes. There is no question made that this is an exclusive power and that no state has any right to trench upon it in the least, and the decisions of the supreme court have been quite frequently to the same effect. In the Eubank case, and in the case of the transportation from St. Louis to Texas (I do not remember the title), where the legislature provided that the shipper could not recover any greater amount than was stated upon the bill of lading, and where, after the bill of lading had been issued, the Interstate Commerce Commission, or some persons acting through its authority, raised the rate, and the railroad company collected the rate, which was above the amount named in the bill of lading, the supreme court held that an act of that kind by the legislature was matter affecting interstate commerce and not within the power of the legislature to enact. There were several of those decisions referred to on this hearing.

It is claimed on the part of the complainants that these regulations of rates in this state, passenger and freight, do interfere with interstate commerce, and instances have been cited as to their effect upon transportation between, we will say, the Twin Cities, and points on the border line of North Dakota; a comparison between

the rates which the state has fixed, which would govern as between these cities and Moorhead, and rates which would govern transportation across the river to Fargo. And it has certainly been very persuasively argued that these rates, fixed by the Minnesota legislature in relation to transportation in Minnesota alone, do of themselves necessarily interfere with interstate commerce, and, under the provisions of the Hepburn law, prohibiting discrimination in respect to localities similarly situated, it is claimed that if the railroad companies themselves, without authority of the state, should fix the present rates between these cities and Moorhead and the interstate rates now existing between these cities and Fargo (and the same with Grand Forks and other places) that they would be liable to prosecution for discrimination. And it would seem to be very difficult to avoid that conclusion, and the conclusion that these rates fixed in respect to Minnesota do necessarily and directly affect interstate commerce. But on the other hand, we have decisions of the Supreme Court, going back at least as far as the case of Munn *vs.* Illinois in the 94th, U. S. and the Granger cases in the same volume, and repeated by very many decisions since and up to the present time (the last one being what may perhaps be termed the dictum of Mr. Justice White in the case which was decided only on the 19th of April last), to the effect that the state has the right to fix rates in respect to local business within the state; that each state has that right. That has been, as I say, decided over and over again by the supreme court. And as it is a fact that if these rates fixed by the Minnesota legislature do interfere with interstate commerce, it is not simply the rates between here and Moorhead which interfere with it, but it would be as well the rates fixed to any point near the borders of the state; the rates in the state to Willmar, or Detroit, or Crookston, would, in the same way, to a lesser degree, interfere with the interstate rates that existed prior to that time between these cities and points in North Dakota. A holding that they did so interfere and for that reason are unconstitutional, if held at all, would apply, it would seem to me, to these rates entirely throughout the state. The state is bordered on all sides by other states, and I do not think it can be held that the rates simply to Moorhead might be unconstitutional and the rest of them constitutional. But in view of the decisions of the supreme court, to which I have referred, and which have been so continually adhered to down to the present time, it seems to me it would be very improper that I should attempt, on this preliminary hearing in this case, to make a holding entirly contrary to those holdings of the supreme court. I should hesitate very much before doing so. Although I do not think I ordinarily hesitate in any case to rule as I deem to be correct according to law, I certainly do pause before holding that these rates are not within the power of the legislature, if they are fairly compensatory.

I have no doubt that congress might very properly, under the constitutional provision giving it the entire power of control over interstate commerce, assume control of the avenues of interstate commerce—of the railroads which are engaged in interstate com-

merce, and of all rates which are collected by those railroads, whether within the states or without the states; because the matter of those rates would affect these avenues of interstate commerce, might affect their ability to continue as avenues of interstate commerce. The rates if they were fixed by the states might be fixed so low in one state, and another, and all of them, that the railroads could not exist and could not perform their functions as carriers of interstate commerce; and for the purpose of securing these railroads as carriers of interstate commerce, congress would have the power under that provision, to take the entire control of the regulation and the rates which the carriers of interstate commerce, upon the avenues of interstate commerce, would have the right to charge, the same as congress has assumed the right, under the very same clause, to control the navigation of the coastwise waters, bays and lakes, and the rivers running through the country—even if the rivers are entirely within a particular state. They have as much control of the Mississippi River above the Falls of St. Anthony as they have between St. Louis and New Orleans; the same control of the Minnesota River, which is entirely within the state—both of which streams have been used for the purpose of navigation within my recollection. On the upper Mississippi, above the falls, there were two lines of steamboats, before the war, for some years; and upon the Minnesota River there were several lines of steamboats, running as far up as Fort Ridgeley, I think; and after congress assumed the control of navigation entirely, it applied this control to those rivers just as much as to rivers that run between states and through several states, and applied it to the bays and inlets on the coasts of the ocean, where there was navigation running from one state to another. The same with the coasts upon the Great Lakes. I think there is no doubt but that matter would be within the control of congress. But, as has been held by the supreme court in many cases, where congress has the power to exercise control, as long as it fails to exercise it the states may exercise control in all matters that are proper—police regulations at any rate. And until congress does exercise that control, and certainly while the supreme court continues to hold, as it has, that the states may regulate the local commerce that is entirely within the state, I do not think it would be proper that I should attempt to hold that these acts are void as invasions of the right of congress to control exclusively the avenues of interstate commerce, although I must confess that the arguments to the effect that these particular acts of the Minnesota legislature do interfere, necessarily and directly, with interstate commerce, are extremely cogent.

Now, with respect to the order of the Railroad and Warehouse Commission which went into effect on the 15th of November last, and which was accepted by the railroad companies, and which they acted under from that time to the commencement of this action, and in respect to the passenger rates, which were fixed by the act of April 4th of the present year, and were accepted by the railroad companies, it is claimed that no preliminary injunction should issue having the effect to stop the operation of that order and that act, and that the office of a preliminary injunction is simply to keep

matters in *statu quo* until the final decision of the case. That is, ordinarily, the effect of a preliminary injunction, and ordinarily it ought not to be extended beyond that. It is true that there may be cases—for instance, where a trustee of property is attempting to put that property in the hands of a third person and to defraud the *cestui que trust* of the property or of its use or benefit, and where that is made clear, and where it has not gone fully into effect but has partly gone into effect and that is made clear, a preliminary injunction may be made so far mandatory as to require,—where the property has been partly taken away from the hands of a trustee, perhaps by his own fraudulent consent, and the *cestui que trust* is likely to be deprived of it—that even a preliminary injunction may be made mandatory so far as to require that that property be restored to the hands of the trustee or into such hands as the court may place it, to preserve it for the benefit of the *cestui que trust*. But that exercise of authority ought not to extend beyond cases where there is actual fraud; where the person receiving the property has no fair claim of right, no fair color of right to the property. If he can show that he has a fair color of right which may be litigated, he ought not to be deprived of an opportunity to preserve the *status quo* until the matter should be properly determined. Now, in this case, in respect to the rates fixed by the Railroad and Warehouse Commission, it is claimed on behalf of the state—and claimed, no doubt, honestly—that these rates are not confiscatory; that they do afford an adequate compensation for the services rendered, in view of the property which is used in the business, and that they are entirely valid; and the same way with the passenger rates. The state insists—and no doubt entirely in good faith—that these rates are compensatory; that these acts are not confiscatory; that they are not in violation of the constitutional provision in any manner. And it seems to me, under those circumstances, that the preliminary injunction cannot go against the enforcement of the rates fixed by the Commission, nor the passengr rates which have been accepted by the railroads and are in operation. I say this without any reference to the fact that the court would have no right to fix rates if it should be determined to enjoin either of these rates. And this will obviate the necessity, upon this hearing, of determining whether the rates fixed by the Commission, or the passenger rates, together or singly are confiscatory, and do not afford reasonable compensation for the services rendered and a proper allowance with respect to the property employed. These, I think, need not be considered.

But the act of April 18th, fixing the commodity rates, has not yet gone into effect. It has been restrained by the preliminary order of this court. And if it appears on this hearing that the rates fixed by that commodity act, in view of the lessening of the rates by the Railroad and Warehouse Commission and the lessening of the rates by the act of April 4th, are not sufficient to be compensatory, and are in fact confiscatory, the preliminary injunction ought to go against the putting of those rates into effect. As has been said, the showing in the case is that under the rates that

were in effect prior to any of these mentioned going into effect, the amount of compensation received by the railroad companies for the services done within this state, in respect to transportation within the state, of property and persons, was not compensatory; that in the case of the stronger roads, although it came very nearly being compensatory, in relation to the others they were far from compensatory. And it was virtually admitted that the effect of the order made by the Railroad and Warehouse Commission was to reduce the amount of compensation which the railroad companies would receive upon the articles that were covered by that order, on merchandise within the state of Minnesota, some 20% to 25% (I think that appeared in the report made by the Railroad and Warehouse Commission to the legislature) and that the effect of the act of April 4th, with respect to passenger rates, cutting the rate from three cents to two cents per mile (which, upon the face of it, would be a cut of 33 1-3%) was in fact, in view of all conditions, actually a cut of about 22% or 23% of the amount which was paid before for like services. It seems to me, upon this evidence of the conditions before either of those new rates were put into effect, and the reductions made by those rates, that if there is added the reduction which is attempted to be made by the commodity act, it will reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate return upon the property invested. And I think, on the whole, that a preliminary injunction should issue, in respect to the rates fixed by Chapter 232, talked of as the commodity rates, and that there should be no preliminary injunction as to the other rates, although the matter as to whether they are compensatory or not is a matter which may be determined in the final determination of the action.

An order will be entered overruling the demurrers in each case.

Endorsed: "Filed Sept. 23, 1907. Henry D. Lang, Clerk."

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Writ of Injunction on the therein-named Edward T. Young, as Attorney General for the State of Minnesota by handing to and leaving a true and correct copy thereof with him and by exhibiting to him the Court's seal and clerk's signature on the original writ personally at Saint Paul in said District on the 24th day of September, A. D. 1907.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Writ of Injunction on the therein-named Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with Howard Elliott, President of above named Company personally and exhibiting the clerks' seal & signature on the original, at St. Paul in said District on the 24th day of September, A. D. 1907.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

I hereby certify and return that I served the annexed Writ of Injunction on James Manahan Geo. L. Loftus, J. C. Applegate, John H. Grass, B. E. Sundberg, H. Julius, J. Ritter, members of the shippers association by handing to and leaving a true and correct copy thereof with each of them and exhibiting the clerk's seal and signature on the original personally at St. Paul in said District on the 25th day of September, A. D. 1907.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

The President of the United States of America to Northern Pacific Railway Company, its officers, directors, agents, servants and employés, and each of them, Edward T. Young, as Attorney General of said State of Minnesota, and E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and each of them, and all other persons and each of them, from and after the time that they shall have knowledge of the Order for a temporary injunction herein, Greeting:

Whereas, in the above entitled cause depending in the Circuit Court of the United States for the District of Minnesota, Third Division, in Equity, an Order was made and entered by said Court

under date September 23, 1907, directing that a writ of injunction issue restraining and enjoining, pending the final hearing of this cause, and until the further order of the Court in the premises, the defendants above named, and each of them, and all other persons and each of them, from and after the time that they shall have knowledge of such Order, from doing certain acts in said Order set forth, and hereinafter more particularly mentioned.

Now therefore, know ye that the said Northern Pacific Railway Company, its officers, directors, agents, servants and employés, and each of them, are enjoined and restrained, pending the final hearing of this cause, and until the further order of the Court in the premises, from publishing, adopting or putting into effect, the tariffs, rates or charges set forth in the Act of the Legislature of the State of Minnesota, approved April 18, 1907, and entitled "An Act Relating to Railroad Freight Rates in the State of Minnesota, and Defining Certain Duties of the Railroad and Warehouse Commission," or any thereof.

That you, Edward T. Young, as Attorney General of said State of Minnesota, are, pending the final hearing of this cause, and until the further order of the Court in the premises, restrained and enjoined from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said Act, or either thereof, or to compel obedience to said Act or compliance therewith, or any part thereof.

That you, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and each of you, and all other persons, and each of them, from and after the time that they shall have knowledge of said Order, are restrained and enjoined, pending the final hearing of this cause, and until the further order of the Court in the premises, from taking or instituting or causing or advising to be instituted any action, suit, step or proceeding for the violation of said Act, or from demanding that any of the rates contained therein be given to them or either of them.

Witness: The Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of September, 1907.

Issued at my office in the City of St. Paul, under the seal of said Circuit Court the day and year last aforesaid.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG, *Clerk.*

[Endorsed:] No. —. United States Circuit Court State of Minnesota. Third Division. Charles E. Perkins and David C. Shepard, Complainats. *vs.* Northern Pacific Railway Company, *et al.*, Defendants. Certified Copy of Writ of Injunction.

"Endorsed: Writ of injunction. Filed October 7th, 1907. Henry D. Lang, Clerk. By Louise B. Trott, Deputy."

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, to-wit: Bill of complaint, Order for Temporary injunction, Restraining order and order to show cause with Marshal's return of service thereon; præcipe for Chancery Subpœna and order, Chancery Subpœna and Marshal's return of service thereon, Appearance of Northern Pacific Ry. Co. and order, Appearance of Ira B. Mills, *et al.* and order, Appearance of J. Rumsey Reeve and order, Appearance of O. J. Whiteman and order, Appearance of E. T. Young, Special, and order, Appearance of Ira B. Mills, E. T. Young *et al.* and order, Order continuing hearing, Motion to dismiss as to E. T. Young, Motion to dismiss Temporary Injunction as to E. T. Young, Motion to discharge, Restraining order as to Railroad and Warehouse Commissioners, Motion to discharge Restraining order as to O. J. Whiteman, Motion to discharge restraining order as to J. Rumsey Reeve, Court proceedings of July 9th, and *9th*, Order continuing hearing on order to show cause, Opinion on motion to dismiss order to show cause as to Attorney General, Order allowing amendments to bill of complaint, Demurrer of Ira B. Mills *et al.* Demurrer of E. T. Young, Demurrer of J. Rumsey Reeve, Demurrer of O. J. Whiteman, Stipulation setting Demurrers down for hearing September 3rd, Answer of Ira B. Mills *et al.*, Court proceedings, Record of hearing, September 3rd, 4th, 5th, 6th, 9th, Order allowing amendment to bill and amendment. Court Proceedings, Record of hearing, September 10th, 11th, 12th, 13th, 16th, 17th, 18th, 19th, 20th and 23rd, Decision on application for Temporary Injunction and Writ of Injunction with Marshal's return of service thereon, with the originals thereof, which are in my custody as such clerk, and that said paper writings are correct copies of such originals, and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said Court, Done at my office in St. Paul, Minnesota, this 19th day of October, A. D. 1907.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG, *Clerk.*

EXHIBIT "B."

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Jared How, came before me personally, and being by me first duly sworn says that he is one of the solicitors for the complainants in the above entitled suit, that in violation of the Order for an injunction entered herein on the 23rd day of September, 1907, and with full knowledge of such Order for an injunction, and all the terms and provisions thereof, the above named defendant Edward T. Young has, without regard thereto, and in disobedience thereof, on the 24th day of September, 1907, filed a petition for an alternative writ of mandamus in the District Court of the State of Minnesota for the County of Ramsey, Second Judicial District, and has caused, on the same date, an order to be issued by said Court directing the Clerk of said Court to issue an alternative writ of mandamus as prayed for in said petition, that such alternative writ of mandamus was thereafter, under the seal of said Court, issued by the Clerk thereof, bearing date the 24th day of September, 1907, and was served upon said Northern Pacific Railway Company, that said alternative writ of mandamus so issued upon the petition of said Edward T. Young, and so served upon said Northern Pacific Railway Company commanded said Northern Pacific Railway Company as follows, to-wit:

"Now, therefore, You, the Northern Pacific Railway Company, the defendant above named, are hereby commanded immediately after the receipt of this writ, to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character and class named and specified in Chapter 232 of the session laws of the State of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said Chapter 232, and that you make and file with the Railroad and Warehouse Commission of the State of Minnesota copies of said schedules, rates, fares and charges, and that from and after the receipt of this writ by you, you receive, haul and transport commodities of the kind, class and character specified and described in said Chapter 232 between stations in the State of Minnesota at and for the rates, fares and charges in said Chapter set

forth, and that for the carrying of such freight no higher or greater charge be asked, demanded or received by you, and that you in all respects comply with the provisions of said Chapter 232 of the session laws of the State of Minnesota for the year 1907, or, in case of your failure so to do, you show cause for such failure, if any there be, before this Court at a special term thereof to be held in the Court house, in the City of St. Paul, Ramsey County, Minnesota, on Saturday, the 5th day of October, A. D. 1907, at ten o'clock in the forenoon of such day, and that you then and there make return to this writ with your certificate on such return as having done as you are commanded."

That this affidavit is made as the basis for an application to the above entitled Court for an order thereof that said defendant Edward T. Young show cause, if any he has, why he should not be punished as for a contempt for his misconduct in failing to obey such order for an injunction heretofore entered herein as aforesaid.

JARED HOW.

Subscribed and sworn to before me this 11th day of October 1907.

ELEANOR TIGH,
Notary Public,
Ramsey County, Minn.

[NOTARIAL SEAL.]

My commission expires Sept. 25, 1908.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

On reading the affidavit of Jared How herein,

Ordered that Edward T. Young, one of the defendants above named, show cause, if any he has, at my Chambers in the Federal Building, in the City of St. Paul, on Monday the 21st day of October, 1907, at ten (10) o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why he should not be punished as for a contempt for his misconduct in failing to obey the order for a temporary injunction entered in this cause under date the 23rd day of September, 1907.

Ordered further, that this Order be served on the above named Edward T. Young, personally, on or before the 14th day of October, 1907.

Dated October 11, 1907.

WM. LOCHREN, *Judge.*

"Endorsed: Affidavit and Order in Proceedings for Contempt. Filed October 16th, 1907. Henry D. Lang, Clerk, By Louise B. Trott, Deputy."

Circuit Court of the United States, District of Minnesota, Third Division. (In Equity.)

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES E. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD and ADOLPH E. MICHAUD, Defendants.

Answer of Edward T. Young to a Rule Awarded Against Him by this Honorable Court on the 11th Day of October, 1907, Requiring Him to Show Cause on Monday the 21st Day of October, 1907, Why He Should Not be Punished for Contempt for Failing to Obey the Order for a Temporary Injunction Entered in this Cause on the 23rd Day of September, 1907.

To the Honorable Judges of the Circuit Court of the United States for the District of Minnesota:

For answer to the rule bearing date the 14th day of October, 1907, which is above referred to, the above named defendant, Edward T. Young, says:

That at the time of the commencement of the above entitled action, and ever since the first Monday in January, 1905, he was and still is the duly elected, qualified and acting Attorney General of the State of Minnesota, and by the Constitution of said State a member of the executive department of its government.

That by the statutes of said State of Minnesota as well as by the common law, this defendant as such Attorney General is charged with the duty of instituting and conducting for and in the name of said State in the courts, as its attorney, such civil actions and proceedings as may be necessary for the enforcement of its laws and for the protection of the public rights. That this defendant in his said official capacity has no power to institute criminal proceedings under the laws of said State, such authority being vested exclusively in the attorneys of the various counties of the State; but this defendant may participate in the trial of criminal proceedings when invited to do so by the Governor or by a county attorney. But no such invitation or request has ever been extended to defendant to institute criminal proceedings under the law hereinafter referred to. That under the laws of said State there is no other officer having the power to perform the duties so assigned to the Attorney General. That when he qualified as such officer this defendant obligated himself by his official oath to perform the duties of said office to the best of his ability.

Defendant admits that on the 23rd day of September, 1907 an Order was made in the above entitled action, in his presence and hearing, directing that an injunction issue therein restraining this defendant from taking any step or proceeding, to compel obedience

by said defendant railway company to the act of the legislature of the State of Minnesota, approved April 18th, 1907, entitled "An Act relating to railroad freight rates in the State of Minnesota and defining certain duties of the Railroad and Warehouse Commission," known as Chapter 232 of the laws of said State for 1907. He further admits and alleges that on said 23rd day of September, 1907, a Writ of Injunction was issued out of this Court, pursuant to said order, and that the same was thereafter, on September 24th duly served on him, which said Writ was in all respects of the tenor and in the form prescribed by said Order, and that in so far as said Writ referred to said Edward T. Young, it was in the words following, to-wit:

"That you, Edward T. Young, as Attorney General of said State of Minnesota, are, pending the final hearing of this cause and until the farther order of the Court in the premises, restrained and enjoined from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies prescribed in said act, or either thereof, or to compel obedience to said act and compliance therewith, or any part thereof."

That the act referred to in said order and injunction was said Chapter 232 above mentioned.

Defendant further admits that on the said 24th day of September, 1907, and after the entry of said Order for injunction and the issuance and service of said Injunction on him, he did file in the district court of the State of Minnesota for the County of Ramsey, a petition asking said court to issue an Alternative Writ of Mandamus, directed to said defendant the Northern Pacific Railway Company commanding it to obey the terms of the act of the legislature of Minnesota above referred to, or to show cause why it had not done so at a time to be fixed by said court, and that pursuant to said petition said district court did said day cause to be issued and served on said Northern Pacific Railway Company an Alternative Writ of Mandamus as prayed in said petition.

But defendant says that said Petition and Writ in said Mandamus proceedings were brought by, in the name of, and for and on behalf of, the State of Minnesota, through this defendant as its Attorney General, and that said proceedings were not in any respect instituted by or on behalf of this defendant as an individual. That a full copy of said Petition, together with the Writ of Mandamus issued pursuant thereto by the said district court and the return of the officer making service thereof, are hereto attached, marked Exhibits "A," "B" and "C" respectively, and referred to as a more full exemplification of the nature, scope and purpose of said proceeding.

That ever since the commencement of this action, this defendant has constantly claimed that this Court had no jurisdiction over him as Attorney General for said state, and as appears by the records in this action, he has in every way possible objected in open Court to such jurisdiction on the ground that said action was commenced against him solely as the Attorney General for said State to prevent him from instituting in the proper courts civil actions for and in the

name of said State to enforce its laws, and defendant here and now repeats each and every of such objections to the jurisdiction of this court. That there is no other action or proceeding pending or contemplated by this defendant against said Railway Company, except said proceedings in Mandamus hereinbefore referred to.

Defendant expressly disclaims any intention to treat this Court with disrespect in the commencement of the proceedings referred to, but believing that the decision of this Court in this action, holding that it had jurisdiction to enjoin this defendant as such Attorney General from performing his discretionary official duties, was in conflict with the 11th Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, defendant believed it to be his duty as such Attorney General to commence said Mandamus proceedings for and on behalf of the State, and it was in this belief that said proceedings were commenced, solely for the purpose of enforcing the said law of the State of Minnesota.

Respectfully submitted,

EDWARD T. YOUNG,
Attorney General of Minnesota.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Edward T. Young, upon oath say, that I am the answering defendant in the above entitled answer, which I have read and the contents of which I know, and that said answer is true of my own knowledge so far as it states the facts.

EDWARD T. YOUNG.

Subscribed and sworn to before me this 21 day of October, 1907.

C. LOUIS WEEKS,
Notary Public, Hennepin County, Minnesota.

My commission expires May 17th, 1912.

[NOTARIAL SEAL.]

EXHIBIT "A."

STATE OF MINNESOTA, *County of Ramsey:*

District Court: Second Judicial District.

THE STATE OF MINNESOTA on the Relation of EDWARD T. YOUNG, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Petition for an Alternative Writ of Mandamus.

To the Honorable the District Court of the Second Judicial District, in and for the County of Ramsey:

The petition of the State of Minnesota by Edward T. Young, Attorney General in said State, respectfully states and shows:

That during all of the times hereinafter mentioned the Relator, Edward T. Young, was, and still is, the duly elected, qualified and acting Attorney General of the State of Minnesota.

That the defendant Northern Pacific Railway Company during all the times hereinafter mentioned was, and still is, a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin, and during all of said times has been, and still is, engaged in operating and maintaining a railroad and railways throughout the various parts of the State of Minnesota, including the County of Ramsey, for the transportation of freight and passengers and as common carrier thereof.

That during all the times hereinafter mentioned said defendant company had full and ample means and facilities for the carrying on of said business, including rolling stock and terminals, and for a long time past has been engaged as a common carrier in transporting freight between stations in the State of Minnesota, and was, and still is, fully equipped, competent and able to carry and accept all shipments of freight tendered to it and to do and perform all of the things necessary in and about the receiving, hauling and delivering of the same as might be demanded and as public necessity might require.

That prior to the 18th day of April, 1907, said defendant railway company had charged and maintained certain rates for the carriage and transportation, between stations in the State of Minnesota, of commodities of the kind and character hereinafter described, according to schedules and tariffs thereof, theretofore filed and of record with the Railroad and Warehouse Commission of the State of Minnesota, as provided by law, which said charges so made and maintained by said defendant railway company were unreasonable, unequal and excessive.

That on the 18th day of April, 1907, there was duly approved an act of the legislature of the State of Minnesota, duly enacted by the

legislature of the State of Minnesota for the year 1907, which said act of the legislature took effect and became of full force and effect on the first day of June, 1907, and is and constitutes Chapter 232 of the Session Laws of the State of Minnesota for the year 1907, and ever since has been, and still is, in full force and effect.

That said Chapter 232, Laws 1907, classified articles therein named, the principal articles so named being grain, including flax seed, lumber, live stock and coal, and contained a schedule of the rates and charges which might thereafter be lawfully maintained and made by railway companies, including defendant, for the transportation between stations in the State of Minnesota of the commodities named in said Chapter from and after the first day of June, 1907.

That in and by said act it was further provided that "No railroad company which is a common carrier of property within the State of Minnesota, shall charge, take or receive any greater sum for carrying within this State between stations therein, any of the commodities named in this act than the respective amounts set forth and provided in Section 2 of this act for the respective distances therein named." Said act further provided "Every railroad company transacting the business of a common carrier within this State shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this State of the commodities named in this act."

And your Petitioner further shows that notwithstanding the provisions of said act and of the laws of the State of Minnesota, said defendant railway company, its officers, agents and employees have refused and neglected, and still continue to refuse and neglect, to adopt and publish or put into effect rates not exceeding the charges specified in said Chapter 232 for the transportation between stations upon its line of road in the State of Minnesota of the commodities named in said Chapter 232, including the commodities hereinbefore specified, but, on the contrary, have at all times since said 18th day of April, 1907, charged, and still continue to charge and exact for the services hereinbefore described, the rates and charges maintained by such railway company prior to the said 18th day of April, 1907, which said rates and charges are greatly in excess of the rates and charges specified and fixed by said Chapter 232. And said defendant railway company, its officers, agents and employees refused, and still continue to neglect and refuse to obey or carry out the provisions of said Chapter 232, Laws 1907 of the State of Minnesota.

That there is no plain, speedy and adequate remedy at law by which the Petitioner can compel the defendant to obey and carry out the provisions of said law of the State of Minnesota hereinbefore referred to.

Wherefore, said Petitioner prays that this Honorable Court make and enter its order directed to said defendant, Northern Pacific Railway Company, commanding and directing that it forthwith adopt and publish, as provided by law, as its rate and charge for the transportation of freight between stations in the State of Minnesota of the kind, class and character described in Chapter 232, Laws 1907, of the State of Minnesota, a rate and charge no higher than the rate

and charge fixed and named in said Chapter 232 therefor, and that said defendant, Northern Pacific Railway Company, its officers, agents, employees and servants refrain from asking, demanding or receiving for the transportation of commodities of the classes and kinds named in said Chapter 232 between stations in the State of Minnesota any greater sum than the respective amounts specified in said law as just, equal and reasonable for such shipment; or to show cause, if any there be, before this Court at a time and place to be specified, why such order should not be made and for such other and further relief in the premises as may be just.

THE STATE OF MINNESOTA,
By EDWARD T. YOUNG,
Attorney General.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Edward T. Young, being duly sworn, deposes and says that he is the Relator named in the foregoing petition. That he has read and known the contents of said petition, and that the same is true.

EDWARD T. YOUNG.

Subscribed and sworn to before me this 24th day of September, A. D. 1907.

[NOTARIAL SEAL.] C. LOUIS WEEKS,
Notary Public, Hennepin County, Minnesota.

My commission expires May 17, 1912.

On the filing of the Petition hereto annexed, the Clerk of the District Court of the Second Judicial District of the State of Minnesota in and for the County of Ramsey, is directed to issue an Alternative Writ of Mandamus which is hereby allowed in the foregoing form, returnable at a special term of said Court in the City of St. Paul, Ramsey County, Minnesota, on Saturday, the 5th day of October, A. D. 1907, at 10 o'clock A. M.; and the service thereof is hereby directed to be made by delivering to and serving with a general officer or any ticket or freight agent of the defendant Northern Pacific Railway Company, at Ramsey County, Minnesota, a copy of said Writ, together with a copy of said Order and a copy of the Petition on which said Writ has allowed, on or before the 25th day of September, A. D. 1907.

Dated at St. Paul, Minnesota, September 24th, A. D. 1907.

GEORGE L. BUNN,
Judge of the District Court.

EXHIBIT "C."

STATE OF MINNESOTA, *County of Ramsey, ss:*

I hereby certify and return, that at the city of St. Paul, county and state aforesaid, on the 24th day of September A. D. 1907, I served the Petition for Mandamus and Order for Writ, hereto attached, upon the within named Northern Pacific Railway Company personally, by handing to and leaving with Howard Elliott, President of the Northern Pacific Railway Company, a true and correct copy thereof.

Dated this 24th day of September, 1907.

WILLIAM A. GERBER,
Sheriff of Ramsey Co., Minn.,
By H. V. KNOCKE, *Deputy.*

Sheriff's fee, service $.50.

EXHIBIT "B."

STATE OF MINNESOTA, *County of Ramsey:*

District Court, Second Judicial District.

THE STATE OF MINNESOTA on the Relation of EDWARD T. YOUNG, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Alternative Writ of Mandamus.

The State of Minnesota to the Northern Pacific Railway Company, the Defendant above named, Greeting:

Whereas, it manifestly appears to us by the petition of the State of Minnesota upon the relation of Edward T. Young, Attorney General of the State of Minnesota:

That during all of the times hereinafter mentioned the Relator, Edward T. Young, was, and still is, the duly elected, qualified and acting Attorney General of the State of Minnesota.

That the defendant Northern Pacific Railway Company during all the times hereinafter mentioned was, and still is, a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin, and during all of said times has been, and still is, engaged in operating and maintaining a railroad and railways throughout the various parts of the State of Minnesota, including the County of Ramsey, for the transportation of freight and passengers and as common carrier thereof.

That during all the times hereinafter mentioned said defendand company had full and ample means and facilities for the carrying

on of said business, including rolling stock and terminals, and for a long time past has been engaged as a common carrier in transporting freight between stations in the State of Minnesota, and was, and still is, fully equipped, competent and able to carry and accept all shipments of freight tendered to it and to do and perform all of the things necessary in and about the receiving, hauling and delivering of the same as might be demanded and as public necessity might require.

That prior to the 18th day of April, 1907, said defendant railway company had charged and maintained certain rates for the carriage and transportation, between the stations in the State of Minnesota, of commodities of the kind and character hereinafter described, according to schedules and tariffs thereof theretofore filed and of record with the Railroad and Warehouse Commission of the State of Minnesota, as provided by law, which said charges so made and maintained by said defendant railway company were unreasonable, unequal and excessive.

That on the 18th day of April, 1907, there was duly approved an act of the legislature of the State of Minnesota, duly enacted by the legislature of the State of Minnesota for the year 1907, which said act of the legislature took effect and became of full force and effect on the first day of June, 1907, and is and constitutes Chapter 232 of the Session Laws of the State of Minnesota for the year 1907, and ever since has been, and still is, in full force and effect.

That said Chapter 232, Laws 1907, classified articles therein named, the principle articles so named being grain, including flax seed, lumber, live stock and coal, and contained a schedule of the rates and charges which might thereafter be lawfully maintained and made by railway companies, including defendant, for the transportation between stations in the State of Minnesota of the commodities named in said Chapter from and after the first day of June, 1907.

That in and by said act it was further provided that "No railroad company which is a common carrier of property within the *the* State of Minnesota, shall charge, take or receive any greater sum for carrying within this State between stations therein, any of the commodities named in this act than the respective amounts set forth and provided in section 2 of this act for the respective distances therein named." Said act further provided "Every railroad company transacting the business of a common carrier within this State shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this State of the commodities named in this act."

That notwithstanding the provisions of said act and of the laws of the State of Minnesota, said defendant railway company, its officers, agents and employees have refused and neglected, and still continue to refuse and neglect, to adopt and publish or put into effect rates not exceeding the charges specified in said Chapter 232 for the transportation between stations upon its line of road

in the State of Minnesota of the commodities named in said Chapter 232, including the commodities hereinbefore specified, but, on the contrary, have at all times since said 18th day of April, 1907, charged, and still continue to charge and exact for the services hereinbefore mentioned, the rates and charges maintained by such railway company prior to the said 18th day of April, 1907, which said rates and charges are greatly in excess of the rates and charges specified and fixed by said Chapter 232. And said defendant railway company, its officers, agents and employees refused, and still continue to neglect and refuse to obey or carry out the provisions of said Chapter 232, Laws 1907 of the State of Minnesota.

That there is no plain, speedy and adequate remedy at law by which the Petitioner can compel the defendant to obey and carry out the provisions of said law of the State of Minnesota hereinbefore referred to.

Now therefore, You, the Northern Pacific Railway Company, the defendant above named, are hereby commanded immediately after the receipt of this writ, to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character and class named and specified in Chapter 232 of the Session Laws of the State of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said Chapter 232; and that you make and file with the Railroad and Warehouse Commission of the State of Minnesota copies of said schedules, rates, fares and charges, and that from and after the receipt of this writ by you, you receive, haul and transport commodities of the kind, class and character specified and described in said Chapter 232 between stations in the State of Minnesota at and for the rates, fares and charges in said Chapter set forth; and that for the carrying of such freight no higher or greater charge be asked, demanded or received by you, and that you in all respects comply with the provisions of said Chapter 232 of the Session Laws of the State of Minnesota for the year 1907; or, in case of your failure so to do, you show cause for such failure, if any there be, before this court at a special term thereof to be held in the Court-house in the city of St. Paul, Ramsey County, Minnesota, on Saturday, the 5th day of October, A. D. 1907, at ten o'clock in the forenoon of such day, and that you then and there make return to this writ with your certificate on such return as having done as you are commanded.

Witness, the Honorable Hascal R. Brill, Judge of the District Court of the Second Judicial District in and for the County of Ramsey, this 24th day of September, A. D. 1907.

MATT JENSEN, *Clerk,*

[SEAL.] By N. C. ROBINSON, *Deputy.*

EXHIBIT "C."

STATE OF MINNESOTA, *County of Ramsey, ss:*

I hereby certify and return, that at the City of St. Paul, county and state aforesaid, on the 24th day of September, A. D. 1907, I served the Writ of Mandamus hereto attached upon the within named Northern Pacific Railway Company personally, by handing to and leaving with Howard Elliott, President of Northern Pacific Railway Company a true and correct copy thereof.

Dated this 24th day of September, 1907.

WILLIAM A. GERBER,
Sheriff of Ramsey County, Minn.,
By H. V. KNOCKE, *Deputy.*

Sheriff's Fee.

Services	$1.00
Travel	.20
	$1.20

[Endorsed:] Copy. United States Circuit Court District of Minnesota Third Division. Charles E. Perkins and David S. Shepard, Complainants *vs.* Northern Pacific Ry. Co., *et al.*, Defendants. Answer of Edward T. Young to rule awarded against him October 11th, 1907.

Endorsed: Filed October 21st, 1907. Henry D. Lang, Clerk, By Louise B. Trott Deputy.

United States Circuit Court, District of Minnesota, Third Division.

C. Equity. No. 857.

CHARLES E. PERKINS and DAVID C. SHEPARD
vs.
NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, CHARLES F. STAPLES, IRA B. MILLS, WILLIAM E. YOUNG, E. A. EVARTS, ACHILLE MICHAUD, O. J. WHITEMAN, J. RUMSEY REEVE, CHARLES MICHAUD, and ADOLPH MICHAUD.

Mr. How. We move on the petition and answer, that the defendant Edward T. Young, be punished for contempt in such manner as the Court shall be advised.

The COURT: Well, the answer of the Attorney General admits the breach of the injunction; I think there is no doubt about that. He denies any disrespect to the Court, but it is necessary in proceedings of this kind, that a Mandate of the Court, like this, be enforced. It cannot be disobeyed. There is no question but that the Attorney General is entirely honest in his belief that this Court has not jurisdiction of him, and that in effect these suits are suits against the

State. But that question has been passed upon already by this Court, and determined to the contrary.

Is there any reason why you should not be punished for contempt and disobedience of the injunction?

The ATTORNEY GENERAL: No. No further reason, your Honor, except those stated in the answer, that in what I did I was acting as an officer of the State.

The COURT: I have no question at all about your good faith in the matter, Mr. Young, but still you as an attorney know that the Mandate of this Court made by this Court must be respected, whether the Court is in error or not, until it is set right. Is there any suggestion as to what punishment shall be?

Mr. How: I have prepared an order, and I thought I would submit it to the Court. It provides that the defendant Edward T. Young be fined the sum of One Hundred Dollars, and stand in the custody of the Marshal until the fine be paid, and until he purge himself of this contempt by dismissing or causing to be dismissed the suit in the State Court that has been mentioned.

The COURT: I suppose the amount of the fine is not material, but it *it* is proper that it should be a substantial amount, and it ought to be such. I think one hundred dollars would be sufficient. I should have made it even less, but I suppose for the purpose of review it is necessary it should be a substantial amount, and I will leave it at the sum of one hundred dollars.

Mr. Marshal, the Attorney General is in your custody.

(Endorsed:) Filed October 21st, 1907. Henry D. Lang, Clerk.

Circuit Court of the United States, District of Minnesota, Third Division.

CHARLES E. PERKINS and DAVID C. SHEPARD, Complainants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, EDWARD T. YOUNG, IRA B. MILLS, CHARLES F. STAPLES, WILLIAM E. YOUNG, E. A. EVARTS, O. J. WHITEMAN, J. RUMSEY REEVE, ACHILLE MICHAUD, CHARLES MICHAUD, and ADOLPH E. MICHAUD, Defendants.

Order.

This matter came on this day to be heard upon the Order heretofore issued against Edward T. Young, Attorney General of the State of Minnesota, to show cause why he should not be punished as for a contempt for his misconduct in failing to obey the order for a temporary injunction entered in this cause under date the 23rd day of September, 1907. After hearing counsel and upon consideration of the matter,

It is ordered and adjudged that the said Edward T. Young is guilty of contempt in his failing to obey such order.

Ordered further that said Edward T. Young forthwith dismiss or cause to be dismissed the suit of The State of Minnesota on the

Relation of Edward T. Young, Attorney General, Plaintiff, *vs.* Northern Pacific Railway Company, defendant, heretofore instituted by him in the District Court of the County of Ramsey, Second Judicial District, State of Minnesota.

Ordered further that for his said contempt said Edward T. Young be fined the sum of One hundred Dollars ($100.00) and stand committed in the custody of the Marshal of this Court until the same be paid, and until he purge himself of his contempt by dismissing or causing to be dismissed said suit last herein mentioned.

Dated October 21, 1907.

WM. LOCHREN, *Judge.*

[Endorsed:] Entered —. Copy. Circuit Court of the U. S. District of Minnesota, Third Division. Charles E. Perkins, *et al., vs.* Northern Pacific Railway Co., *et al.* Order of Commitment for Contempt. Filed October 21st, 1907. Henry D. Lang, Clerk.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, to-wit Affidavit and Order in Proceedings for Contempt, Answer of Edward T. Young to Rule awarded against him October 11th, 1907, Record of proceedings on Order to Show cause, and Order of commitment for Contempt, with the originals thereof, which are in my custody as such clerk, and that the said paper writings are correct copies of such originals and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said Court, Done at my office in St. Paul, Minnesota, this 21st day of October, A. D. 1907.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG, *Clerk.*

[Endorsed:] No. 857. Equity. United States Circuit Court, District of Minnesota, 3rd Division. Charles E. Perkins *et al. vs.* Northern Pacific Ry. Co. *et al.*, Defendants. Certified copies. Order to show cause &c. on contempt proceedings.

[Endorsed:] Supreme Court United States of America. *In re* Edward T. Young. Petition for Writ of *Habeas Corpus.*

Office Supreme Court, U. S.
FILED.
OCT 28 1907
JAMES H. McKENNEY,
CLERK.

21

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~10~~ Original.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

BRIEF ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

THOMAS D. O'BRIEN,
GEORGE T. SIMPSON,
CHARLES S. JELLY,
ROYAL A. STONE,
Solicitors for Petitioner.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28396

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. Original.

IN RE EDWARD T. YOUNG, PETITIONER.

BRIEF ON MOTION FOR LEAVE TO FILE PETITION.

Statement of Facts.

On the 18th day of April, 1907, there was approved an act of the Legislature of the State of Minnesota, which is now chapter 232 of the Laws of Minnesota for the year 1907. The act prescribed the maximum rates which might be charged by railroad companies for the carriage between stations in Minnesota of certain commodities, notably grain, lumber, live stock, and coal.

Section 1 of this act divided the commodities to which it referred into seven classes, numbered from eleven to seventeen, inclusive.

Section 2 contained the schedule of maximum rates to be charged for each class when transported in car-load lots between stations in Minnesota.

Section 3 established the minimum weight which should constitute a car-load of each class.

The act then provides:

> "SECTION 4. No railroad company which is a common carrier of property within the State of Minnesota

shall charge, take or receive any greater sum for carrying within this State, between stations therein, any of the commodities named in this act, than the respective amounts set forth and provided in section two of this act for the respective distances therein named.

"SECTION 5. This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State. Whenever in a proceeding regularly pending before the Railroad and Warehouse Commission, it shall be made to appear to the satisfaction of said commission, that the rates herein prescribed are unreasonable, it may, by order, fix higher or lower rates, for the transportation of any of the commodities herein mentioned over the line of any railroad in this State, and such rates, when so fixed, shall supersede the rates herein prescribed upon said line of railroad, and shall be enforced as prescribed by the law relating to such orders, but until such order shall have been made by said Railroad and Warehouse Commission, the rates herein prescribed shall be the exclusive legal maximum rates for the transportation of the commodities herein enumerated between points within this State.

"SECTION 6. Every railroad company transacting the business of a common carrier within this State shall adopt and publish, and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this State of the commodities named in this act; and every officer, director, traffic manager or agent or employee of such railroad company, exercising any authority, or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by such railroad company of rates not exceeding those specified in this act; and any officer, director, or such agent or employee of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists

any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends and in which it has a station and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

"SECTION 7. If, at any time of taking effect of this act, any railroad is maintaining a rate between any two stations in this State that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate."

"SECTION 8. This act shall take effect and be enforce from and after June 1, 1907."

Prior to the passage of this act the Legislature of Minnesota, by an act approved April 4, 1907, had established maximum passenger rates for that State at two cents per mile, and in the previous September the Railroad and Warehouse Commission of the State of Minnesota had established certain rates for the transportation of general merchandise. The merchandise rates so established had been accepted by the railroad companies and have been in effect since the 15th of November, 1906. The act establishing maximum passenger rates took effect May 1, 1907, and was put into operation by the railroad companies on that date. The act of April 18, chapter 232, took effect on June 1, 1907, but because of the restraining orders, which we will hereafter describe, has never been observed by the companies.

On the 31st of May, 1907, Charles R. Perkins, a citizen and resident of the State of Iowa, and David C. Shepard, a citizen and resident of the State of Minnesota, as stockholders of the Northern Pacific Railway Company, brought a suit in equity in the Circuit Court of the United States for the Third Division of the District of Minnesota against the Northern Pacific Railway Company, a corporation of Wisconsin, the petitioner; Edward T. Young, Attorney General of the State of Minnesota; Ira B. Mills, Charles F. Staples,

and William E. Young, the members of and constituting the Railroad and Warehouse Commission of the State of Minnesota, and E. A. Ewert, O. J. Whiteman, J. Rumsey Reeve Achille Michaud, Charles Michaud, and Adolph Michaud, the last-named six persons being residents and citizens of the State of Minnesota and designated in the bill of complaint as shippers, and therefore persons interested in freight rates.

The prayer for relief contained in the bill was in part as follows:

> "That the said Edward T. Young, as Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples, and William E. Young, as the Railroad and Warehouse Commission of the State of Minnesota, be temporarily and permanently restrained and enjoined from any attempt to compel said railway company to observe, publish, post, or put in force said rates or any of them, as fixed by said order of September 6, 1906, or said order of May 3, 1907; and, further, be temporarily and permanently restrained and enjoined from taking any action, step, or proceeding against said railway company, or any of its officers, directors, agents, or employees, to enforce any penalties or remedies for the violation by said railway company of said orders or either of them.
>
> "That said Edward T. Young, as Attorney General, be temporarily and permanently enjoined and restrained from taking any action, step, or proceeding against said railway company, its officers, agents, or employees, to enforce the penalties and remedies specified in said acts of April 4, 1907, and April 18, 1907, or either of them."

Subpœnas were issued, directed to the defendants, and a rule or order to show cause why they should not each be temporarily enjoined during the pendency of the action, as prayed in the bill of complaint.

The Attorney General, Edward T. Young, entered a special appearance and moved for a dismissal of the action, as to him, upon the grounds set out in the motion, a copy

of which is attached to his petition, his main contentions being that the action against him as Attorney General was in effect an action against the State of Minnesota, and, as such, prohibited by the eleventh amendment to the Constitution of the United States, and that the circuit court had no jurisdiction to entertain the suit as to him and had no jurisdiction to control the exercise by him of the executive discretion vested in him as Attorney General of the State of Minnesota.

The motion to dismiss was denied, and the Attorney General thereupon made return to the order to show cause, asking that it be discharged as to him for practically the same reasons upon which he had based the motion to dismiss. This action was also denied, and the Attorney General thereupon filed a demurrer, in which he reiterated his claim that the court was without jurisdiction to entertain the action or to control his executive discretion, and attacked the bill further, in that the same was multifarious, stated no facts sufficient to show complainants entitled to any relief, and stated no facts sufficient to show that the 94th equity rule had been complied with.

Several of the other defendants, including the members of the Railroad and Warehouse Commission, also filed demurrers and in addition made a showing upon the merits why a temporary injunction should not be issued.

The hearing upon the merits of the order to show cause commenced in September, 1907, and on the 23d day of that month the court made its order overruling the demurrers and directing the issuance of a temporary injunction restraining the enforcement of, or any attempt to enforce, the provisions of the act of April 18, 1907 (chapter 232, Laws 1907), but refused to interfere by temporary injunction with the enforcement of the order of September 6, 1906, establishing merchandise rates or the act of April 4, 1907, establishing maximum passenger rates.

The temporary injunction issued pursuant to the order contains the following direction:

"That you, Edward T. Young, as Attorney General of the said State of Minnesota are, pending the final hearing of this cause, and until the further order of the court in the premises, restrained and enjoined from taking or instituting any action, suit, step, or proceeding to enforce the penalties and remedies specified in said act or either thereof, or to compel obedience to said act or compliance therewith or any part thereof."

On the 24th day of September, 1907, the Attorney General commenced an action in the District Court of the Second Judicial District of the State of Minnesota in and for the County of Ramsey, in which the State of Minnesota upon the relation of the Attorney General was complainant and the Northern Pacific Railway Company was respondent, in which that court was asked to direct the issuance of a writ of mandamus, commanding the Northern Pacific Railway Company to comply with the provisions of chapter 232, Laws 1907, or show cause for its refusal to do so. The court ordered the issuance of an alternative writ of mandamus, directed to the respondent, as prayed for in the petition, and it was issued and served upon the railway company.

On the 11th day of October, 1907, upon the affidavit of Mr. Jared How, one of the solicitors for the complainants in the suit in the circuit court, an order was issued by that court directing that Attorney General Young show cause before that court on the 21st day of October why he should not be adjudged guilty of contempt and be punished therefor because of the institution of the mandamus proceeding in the State court. Mr. Young made his return to the order to show cause, and thereupon he was by Honorable William Lochren, sitting as circuit judge, adjudged to be guilty of contempt, and by an order thereupon made directed to dismiss the action against the Northern Pacific Railway Company commenced in the State court, and to pay a fine of one hundred dollars, and was committed to the custody of the marshal until the order was obeyed.

Certified copies of all these proceedings and orders are filed with the petition, the proceedings in the circuit court, culminating in the issuance of the injunction, constituting Exhibit "A," and the subsequent proceedings, culminating in the order punishing the petitioner for contempt, constituting Exhibit "B." The evidence presented in the form of affidavits, upon the hearing for temporary injunction, being immaterial, is not included.

This application for a writ of *habeas corpus* is made by the petitioner upon the claim that—

1. The Circuit Court was without jurisdiction of the action in which the interlocutory order granting an injunction was made, as there was no diverse citizenship between the parties nor was any Federal question involved;

2. The suit so instituted against him as Attorney General and to restrain the exercise by him of the executive discretion vested in him, and to control his official action as such was in effect a suit against the State of Minnesota, and the circuit court was therefore entirely without jurisdiction to entertain it;

3. That the order of the circuit court made in that suit, restraining the exercise by the petitioner of the executive discretion vested in him as Attorney General, was beyond the jurisdiction, power, and authority of the court.

He is therefore, by the direction and judgment of the Circuit Court of the United States for the District of Minnesota restrained of his liberty as punishment for refusing to comply with an order which that court had no authority to make; that the order itself, being without jurisdiction, was void, and the order punishing for contempt is equally void, and that this court will make "inquiry into the cause of the restraint of liberty."

Ex Parte Fisk, 113 U. S., 713.

ARGUMENT.

I.

THE PETITIONER BEING RESTRAINED OF HIS LIBERTY BY THE UNITED STATES MARSHAL PURSUANT TO AN ORDER OF A CIRCUIT COURT OF THE UNITED STATES, WHICH COURT IT IS CLAIMED WAS ENTIRELY WITHOUT JURISDICTION OR AUTHORITY TO MAKE THE ORDER, THIS COURT WILL BY THE WRIT OF HABEAS CORPUS MAKE "INQUIRY INTO THE CAUSE OF RESTRAINT."

If, as is here claimed, the circuit court was without jurisdiction to entertain, as against the petitioner, the suit in which the temporary injunction was issued, or if the issuance of the injunction was beyond its authority, the order punishing the petitioner for violating the injunction was void. Under such claim this court will, as it has uniformly decided, entertain an application for a writ of *habeas corpus* and, if the claimed lack of jurisdiction or authority in the lower court is shown to be well founded, discharge the prisoner from custody.

The rule was most clearly stated by Mr. Justice Miller in *Ex parte Fisk*, 113 U. S., 713-718.

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court has no authority to make, the order itself, being without jurisdiction, is void and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will by its writ of *habeas corpus*, discharge the prisoner. It follows necessarily that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of the restraint of liberty'" (Sec. 752, Rev. Stat.).

We realize fully that this court will not permit the writ of *habeas corpus* to take the place of, or be converted into, a writ of error, and that where no appeal, or writ of error, is allowed by statute the judgment of a circuit court *having jurisdiction and authority* is final. Errors of law committed by such court will not be reviewed by this court in proceedings by *habeas corpus*. This distinction has been made in innumerable decisions of this court and was pointed out also by Mr. Justice Miller in the opinion written by him in the case of *Ex parte* Yarbrough, 110 U. S., 651, from which we quote the following:

> "That this court has no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such court had no jurisdiction, to discharge a prisoner from confinement."
>
> Citing—
>
> *Ex parte* Kearney, 7 Wheat., 38.
> *Ex parte* Wells, 18 How., 307.
> *Ex parte* Lange, 18 Wall., 163.
> *Ex parte* Parks, 93 U. S., 18.

And again:

> "It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further."

We know of no decision of this court which in any degree modifies these declarations as to the law and practice of this court governing this application. They are fully sustained by each of the following decisions:

Ex parte Lange, 18 Wall., 163.
Ex parte Parks, 93 U. S., 18.
Ex parte Siebold, 100 U. S., 371.
Ex parte Rowland, 104 U. S., 604.
Ex parte Ayers, 123 U. S., 443.
Ex parte Kearney, 7 Wheat., 38.
Ex parte Royall, 117 U. S., 241.
Ex parte Mayfield, 141 U. S., 107.
Ex parte McKenzie, 180 U. S., 536.
Ex parte Watkins, 3 Peters, 193.
Delgado *v.* Chaves, 140 U. S., 586.

II.

THE CIRCUIT COURT HAD NO JURISDICTION TO ENTERTAIN THE SUIT IN WHICH THE ORDER PUNISHING FOR CONTEMPT WAS MADE, AS THERE WAS NO DIVERSITY OF CITIZENSHIP WHICH WOULD CONFER JURISDICTION UPON THAT COURT.

It appears from the bill of complaint, a copy of which is included in Exhibit "B," attached to the petition, that the complainant Perkins is a citizen of Iowa and the complainant Shepard a citizen of Minnesota. The defendant, the Northern Pacific Railway Company, under the familiar rule of this court, must, for the purpose of determining the jurisdiction of the court, be also considered a complainant. The suit, then, is as one between a citizen of Iowa, a citizen of Minnesota, and a citizen of Wisconsin, as complainants, and against citizens of Minnesota as defendants. It will not be claimed that under such circumstances the circuit court had jurisdiction because of diverse citizenship.

Removal Cases, 100 U. S., 457.
Walden *v.* Skinner, 101 U. S., 577.
Pacific R. R. Co. *v.* Ketchum, 101 U. S., 289.
Harter *v.* Kernochan, 103 U. S., 562.

III.

NO FEDERAL QUESTION WAS PRESENTED BY THE BILL OF COMPLAINT WHICH JUSTIFIED THE CIRCUIT COURT IN ASSUMING JURISDICTION.

Under the act of March 3, 1875, the Circuit Court of the United States may take cognizance of all suits of a civil nature "arising under the Constitution or laws of United States."

The suit in the circuit court in which the order under consideration was made did not arise under the Constitution or any law of the United States. While it was claimed that the action of the Legislature of Minnesota was an interference with interstate commerce the only real controversy presented was whether or not the rates prescribed by the Legislature were so low as to deprive the complainants of their property without due process of law and without just compensation.

This was a single question of fact, for it is settled beyond controversy by the decisions of this court that, if the rates prescribed by a State to be charged by a common carrier for its services are so low as to be what is termed *confiscatory*, the enforcement of such rates deprives the carrier of its property without due process of law or due compensation, and would therefore be in violation of the Constitution of the United States.

We submit that unless the following propositions of law are open to controversy the bill of complaint in the circuit court presented no Federal question which justified the court in assuming jurisdiction:

1. That each individual State has the exclusive right to regulate commerce beginning and ending within such State.

2. That the establishment of reasonable rates by a State covering purely internal commerce of the State is not an interference with, or burden upon, interstate commerce.

3. That the power to regulate is not the power to destroy; that the rates so prescribed must be sufficient to pay the cost of the services involved and allow some return for the use of the property engaged in the service.

These three propositions are settled beyond controversy by the following decisions:

Munn *v.* Illinois, 94 U. S., 113.
C., M. & St. Paul *v.* Minnesota, 134 U. S., 418.
Wisconsin, &c., R. R. *v.* Jacobson, 179 U. S., 287.
M. & St. L. R. R. *v.* Minnesota, 186 U. S., 257.
Covington *v.* Bridge Co., 154 U. S., 204.
Houston Central Ry. Co. *v.* Mayes, 201 U. S., 321.
McNeill *v.* Southern Ry. Co., 202 U. S., 543.
Stone *v.* Farmers' Loan & Trust Co., 116 U. S., 307.

If this is true, we submit that no controversy arising under the Constitution or any law of United States was presented; for, where the proper construction and effect of the Constitution or law has been finally settled by the decisions of this court, that construction is beyond controversy, and a mere attack contained in a bill of complaint upon such settled construction does not raise a controversy under the Constitution or law which justifies a circuit court in assuming jurisdiction.

Gold Washing & Water Power Co. *v.* Keyes, 96 U. S., 199.
Tennessee *v.* Davis, 100 U. S., 257.
New Orleans *v.* Benjamin, 153 U. S., 411.
McCain *v.* Des Moines, 174 U. S., 168.
Defiance Water Co. *v.* City of Defiance, 191 U. S., 184.
Hooker *v.* Los Angeles, 188 U. S., 314.
Shoshone Ins. Co. *v.* Rutter, 177 U. S., 505.
Blackburn *v.* Gold Min. Co., 175 U. S., 571.
Carson *v.* Durham, 121 U. S., 421.
Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S., 282.

Minn. *v.* Northern Security Co., 194 U. S., 48.
Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S., 239.
Equitable Life Assurance Co. *v.* Brown, 187 U. S., 308.
New Orleans Water Works Co. *v.* La., 185 U. S., 336.
New Orleans *v.* Water Works Co., 142 U. S., 79.
Hambline *v.* Western Land Co., 147 U. S., 531.
St. Joseph, &c., Co. *v.* Steele, 167 U. S., 659.
Wilson *v.* North Carolina, 169 U. S., 586.

IV.

THE CIRCUIT COURT EXCEEDED ITS POWER AND AUTHORITY IN MAKING ITS ORDER THAT THE PETITIONER BE ENJOINED AS ATTORNEY GENERAL FROM TAKING APPROPRIATE LEGAL PROCEEDINGS TO COMPEL COMPLIANCE BY THE RAILWAY COMPANY WITH THE ACT OF APRIL 18,1907. THE ATTORNEY GENERAL OF MINNESOTA IS A CONSTITUTIONAL EXECUTIVE OFFICER. HE HAS NO DUTY IMPOSED UPON HIM WITH REFERENCE TO THE ENFORCEMENT OF CHAPTER 232, LAWS OF 1907, EXCEPT SUCH AS HE MAY DEEM INCUMBENT UPON HIM IN THE EXERCISE OF HIS EXECUTIVE DISCRETION.

Section 1 of article V of the Constitution of Minnesota provides that—

> "*The executive department* shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, and *attorney general*, who shall be chosen by the electors of the State."

The duties and powers of the Attorney General are only in small part prescribed by statute. (See Revised Laws of Minnesota, 1905, section 56 *et seq.*, and General Laws of Minnesota, 1905, chapter 227.) He is required to appear in the Supreme Court of the State and the federal courts in all causes wherein the State is directly interested. Only upon request of a county attorney (and then only when he

deems it advisable), or upon request of the governor, is he required to take any part in the prosecution of indictable criminal actions in the district courts of the State. In all other causes he is charged with no duty whatever as to criminal actions until the same reach the Supreme Court.

As to corporations, he may cause proceedings to be instituted against them whenever they offend against the laws of the State or misuse, surrender, abandon, or forfeit their franchise (Revised Laws of Minnesota, 1905, sections 58 and 4544; General Laws of Minnesota, 1905, Chapter 227, section 3).

By section 1960, Revised Laws of Minnesota, 1905, he is made *ex officio* the attorney for the Railroad and Warehouse Commission, and in that capacity "shall institute and prosecute all actions which the commissioners shall order brought." That section neither adds to nor detracts from his duties, for *ex officio* he is the attorney for all State officers (Revised Laws, 1905, section 61). Moreover, it has no bearing here, for the Railroad and Warehouse Commission is charged with no duty in the premises, and the temporary injunction restrains the action of the petitioner solely with reference to the enforcement of chapter 232 and "as Attorney General."

In addition to the powers conferred by statute, the Attorney General has all the powers belonging to that office at common law. As the principal law officer of the government, his powers do not rest alone upon express statutory enactment. The authority of the Attorney General to prosecute or defend a suit in which the State is concerned is necessarily implied from the nature of his office, and he may bring an action where the wrong or injury complained of affects the public generally whenever there is a proper cause.

4 Cyc., 1028-1031.

Hunt *v.* Ry. Co., 121 Ill., 638.

Orton *v.* State, 12 Wis., 567.

Attorney General *v.* Williams, 174 Mass., 476; 47 L. R. A., 314.

People *v.* Oakland, 118 Cal., 234.

Attorney General *v.* Detroit, 26 Mich., 262.

In State *ex rel.* Young *v.* Robinson, decided by the Supreme Court of Minnesota June 7, 1907 (112 N. W. Rep., 269), it was held that the Attorney General, as chief law officer of the State, possesses and may exercise, in addition to the authority expressly conferred upon him by statute, all common-law powers incident to and inherent in the office.

It therefore appears conclusively that, as the chief law officer of the State, the Attorney General is second to no officer of the State in the character and importance of his duties. No suit can be brought by the State except by him. No defense can be made by the State except through him. With minor exceptions, such as the institution of criminal actions at the request of the Governor, *his discretion in the prosecution and management of actions to which the State is a party is absolutely uncontrolled. There is nothing of a ministerial character about his duties, in so far as they relate to litigation conducted by him in the name of the State.* The name and power of the State, so far as their use in litigation is concerned, are confided to his discretion, subject to control by no other officer or department, except in certain specified cases, within none of which these suits, or any matter in issue therein, falls.

The non-ministerial character of the Attorney General's duties and the discretionary nature of his power are all-important, in view of the principles and authorities hereinafter examined.

The Attorney General, as such, has no right to institute criminal prosecutions for a failure to comply with the provisions of the law of Minnesota the enforcement of which was restrained by the order of the circuit court.

A criminal prosecution under that statute to try an officer of the railroad company for a misdemeanor would be conducted by, and in charge of, the county attorney of the county in which the case was pending, and the Attorney General would have no duty with reference thereto until the case reached the Supreme Court of the State. Even though

the county attorney requested his aid in the district court, it would be discretionary with him to extend such assistance.

As Attorney General, but one course would be open to him, and that would be to proceed by mandamus against the company failing to comply with the laws. Such a suit, aside from being one which a court of equity will not enjoin, would be brought by the State of Minnesota as plaintiff. He would be only, by proper legal proceedings in a court of competent jurisdiction, testing the validity of the law, in which proceeding every guaranty of the Federal Constitution could and would be given its full effect and every right of the railway company and its stockholders be fully protected.

V.

WHEN THE PETITIONER AS ATTORNEY GENERAL WAS MADE A DEFENDANT IN THE SUIT IN THE CIRCUIT COURT, THE ACTION WAS IN EFFECT A SUIT AGAINST THE STATE OF MINNESOTA, AND, BEING COMMENCED WITHOUT ITS CONSENT, WAS IN VIOLATION OF THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. THE CIRCUIT COURT, THEREFORE, WAS WITHOUT JURISDICTION.

The rule for the construction of the eleventh amendment was thus stated in *In Re* Ayres, 123 U. S., 443-505 (31 L. Ed., 216):

> "* * * To secure the manifest purposes of the constitutional exemption guaranteed by the 11th amendment requires that it should be interpreted, not too literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but also those against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

We invoke the eleventh amendment here because we believe that the State of Minnesota is "the only real party against which alone in fact the relief is asked" and against which the judgment and decree prayed for would directly and effectually operate.

The complainants did not complain and cared nothing whatever about any action which Mr. Young might take or any suit he might bring as an ordinary individual. He was not proceeded against as a shipper. He was complained of as the officer to whose discretion is confided the use of the name of the State of Minnesota, so far as litigation is concerned. Except as he controlled the action of the State, no relief was sought as against him.

The only action that he could have commenced was a suit by mandamus the plaintiff wherein would be the State. The State can sue only by its Attorney General. Therefore, when he is prevented from commencing such action, the State itself is restrained. The injunction operates as directly upon the State and as effectively restrains it from proceeding in its own name to institute a suit as it would if directed to the State itself and served upon the Governor and Attorney General, which is the practice in cases where the State can be and is made a party.

Having shown that a proceeding by mandamus is the only action which Mr. Young as Attorney General could inaugurate, which action would be commenced by the State, we now assert that the State may bring action only by virtue of its sovereign and governmental character. The right to bring such action is an attribute, and a necessary attribute, of a sovereign government.

It is by virtue of its police power that the State may regulate common carriers and prescribe reasonable rates. This has not been doubted since the decision in Munn *v.* Illinois, 94 U. S., 113. Therefore it is not alone by virtue of any "pecuniary" interest in the subject-matter or by reason of any assumed individual character that the State passes laws

such as those here in question and commences actions to test and establish their validity and, when found valid, to enforce them. It is by virtue of its sovereignty, for police power is possessed and can be exercised by none but the sovereign.

In Barbier *v.* Connolly, 113 U. S., 31, the object of the police power was said to be—

> "To prescribe regulations to promote the health, peace, morals, education, and good order of the people, and *to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.*"

Sovereign government is vested with no power of higher degree than the police power as above described. A late work defines it as "*nothing less than a name for the residual powers of sovereignty* after shearing off the powers of taxation and eminent domain."

McGehee on Due Process of Law, p. 302.

It is in its character as a sovereign, then, that Minnesota enacts and enforces rate laws. Having the power to enact the laws, it has the power to commence actions, either civil or criminal, for their enforcement. It may arrest an offender against the law or it may proceed against him by mandamus. In either case the institution of the suit is an act of the government which cannot be restrained. Therefore the interest of the State of Minnesota in the enforcement of its rate laws is something more than the "pecuniary" interest referred to in Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362 (390); 38 L. Ed., 1014 (1021). It is the higher interest of the sovereign in the welfare of its people. It is the interest of the people in their own welfare that prompts them in their sovereign capacity to commence an action to compel obedience to law. The fact that in a civil suit they must act through an Attorney General makes it no less the act of the sovereign people. The fact that they can in a civil suit act

only through him makes restraint of him more obviously the restraint of the government.

Where does any pecuniary interest in such suit lie? It is not with the shippers as such, for not one of them is affected financially by railroad rates or their increase or decrease, provided that they operate equally upon all. The merchant, the grain buyer, the manufacturer, all collect their freight charges from the producer or consumer, as the case may be. Take, for example, the rate on grain. The price received by the farmer is the terminal market quotation less freight, commission, and the profit of the local dealer. In every case the burden of the freight charge is borne by the farmer. It is the first and largest element in the difference between the price received by him and the price at the terminal market. In no case is it borne by the local dealer or so-called "shipper." It is the same in every other line of trade. It is therefore seen that the burden of freight charges falls not upon the "shippers," but upon the producers and consumers of the State, upon the people at large. Nothing affects their welfare so directly or so generally and nothing affects the welfare of the shippers so little as a change in freight rates. Inasmuch, therefore, as the burden of an increase in rates falls entirely and directly upon the people, it falls upon the State, for the people are the State. From the standpoint of "pecuniary" interest alone, the State is interested in nothing more than it is in the transportation charges paid by its people.

In order to justify the suit in the circuit court as against the Attorney General, it is necessary to show it to be within that class of cases where—

> "An individual is sued in tort for some act injurious to another in regard to person and property, to which his defense is that he has acted under the orders of the government."
>
> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he

> *asserts* authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."
>
> Reagan *v.* Farmers' Loan & Trust Co., *supra*, 391.

quoting from—

> Cunningham *v.* Macon & Brunswick Railway Co., 109 U. S., 446; 27 L. Ed., 992.

This cannot be done as to Mr. Young, because—

1. No act injurious to another in regard to person or property has been done or was threatened;

2. Mr. Young was sued only as, and because he is, the Attorney General;

3. For any action that he could take, he could and did show "an authority sufficient in law to protect him."

A single action by mandamus against a railway company would not be a personal wrong or an act injurious to person or property. It is because he is Attorney General, and for no other reason, that he was restrained from bringing such an action. Finally, for his authority to bring such an action we do not look to the rate laws (which confer no authority upon him), but to the constitution of the State and its statutes prescribing his duties. These are valid laws and confer sufficient authority upon the Attorney General to commence actions to compel obedience to any law of the State.

In the Reagan case it was said (391):

> "Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

The converse of this must be true. If complainants can maintain the suit in the circuit court, like suits can be pros-

ecuted by citizens of the State in its own courts. To entertain that suit against the Attorney General is to open the door for judicial interference with executive action and in effect to subject the State to innumerable suits in both its own and the Federal courts. A new practice will be instituted. Instead of waiting to be proceeded against in a suit by the State at a time and in a tribunal chosen by it, individuals and corporations may choose their own time and tribunal and commence suits in effect against a State by proceeding against its Attorney General.

If there had been added to the eleventh amendment a proviso to the effect that suits by individuals against the Governor or Attorney General of a State, or either of them, to control and restrain their official executive and discretionary action should not be considered suits against a State, the amendment would not have been considered for a moment. The addition of such a proviso at the time of its proposal to Congress would have made the author the laughing-stock of that body. After the decision in Chisholm *v.* Georgia, 2 U. S., 419, and the popular agitation resulting in the practical reversal of that case by the adoption of the eleventh amendment, such a proposed addition to the eleventh amendment would have been considered as an effort to nullify its effect.

This line of argument was used in the decision in—

Hans *v.* Louisiana, 134 U. S., 1 (33 L. Ed., 842),

and quoted with approval in—

Smith *v.* Reeves, 178 U. S., 436 (44 Ed., 1140).

The question involved in the Hans case was whether or not a suit could be maintained against a State by one of its own citizens, such a suit not being within the express prohibition of the eleventh amendment. In disposing of it the court said (p. 15):

"* * * Suppose that Congress, when proposing the eleventh amendment, had appended to it a

> proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

It seems to us equally absurd to suppose that the amendment would have gotten through Congress, let alone being adopted by the people, if it had carried with it the proviso above suggested. This argument is as fatal to the contention of the complainants in the case in the circuit court and their effort to bind the State of Minnesota by joining its Attorney General as a party defendant as it was to the attempt to sustain a suit against a State by one of its own citizens.

We now proceed to an examination of the authorities, and it will be found that—

No suit has ever been sustained against the officers of a State unless—

(1) *They were, as to the plaintiff, personal wrongdoers; or*

(2) *The action sought to be controlled was purely ministerial.*

To sustain our position, it is probably sufficient to cite and consider—

> *In Re* Ayers, *supra*, and
> Fitts *v.* McGhee, 172 U. S., 516 (43 L. Ed., 535).

The latter case was expressly put upon the authority of the former, the nature of which was thus stated (172 U. S., 525; 43 L. Ed., 540):

> "* * * It appears from the report of that case that the Circuit Court of the United States for the Eastern District of Virginia in *Cooper v. Marye* made an order forbidding the Attorney General of

> Virginia and other officers of that Commonwealth from bringing suits under a certain statute of Virginia, in its name and on its behalf, for the recovery of taxes in payment of which the tax-payers had previously tendered tax-receivable coupons. The State officers did not obey this order, and having been proceeded against for contempt of court, they sued out writs of *habeas corpus* and asked to be discharged upon the ground that the circuit court had no power to make the order for disobeying which the proceedings in contempt were commenced."

By the law complained of in the Ayers case, it was expressly made the duty of the Attorney General to institute and prosecute proper proceedings for the recovery of the taxes for which the coupons had been tendered in any case where a proper report was made to him. This court in its decision first considers the case of Osborn *v.* Bank, 9 Wheat., 738, and it is stated with respect to that case that it is no longer necessary for the question of whether or not a given suit is one against the State to be determined by a resort to the record alone. Even the Osborn case had stated that (p. 358)—

> "The State not being a party on the record and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

This, as said in the Ayers case (p. 488)—

> "* * * conveys the intimation, that where the defendants, who were sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail as to the nominal defendants, for want of a suitable subject-matter."

In the case in the circuit court none of the defendants have even a nominal interest.

The court further said (p. 496) (and the following quotations appear in Fitts *v.* McGhee):

> "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained, * * * reduced to the mere bringing of an action in the name of and for the State against taxpayers, who, although they may have tendered tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers."

Again at p. 497:

> "The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State. * * * The acts sought to be restrained are the bringing of suits by the State * * * in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintaind—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. * * * If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.
>
> The nature of the case as supposed is identical with that of the case as actually presented in the bill, with a single exception, that the State is not named as a

> defendant. How else can a State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

It should be noted here that there is no way whereby the State of Minnesota can commence a civil action to test and enforce any of its laws except by its Attorney General. He has supreme and exclusive control over the name of the State, so far as litigation of that kind is concerned. Therefore, in order to effectually restrain that State from commencing such an action, it is necessary only to enjoin the Attorney General, and when he is enjoined the State is enjoined.

One of the arguments made in the Ayers case was that the circuit court had jurisdiction to restrain the officers of the State from executing the provisions of State enactments which were repugnant to the United States Constitution. That is the ground upon which complainants base their attempt to enjoin the Attorney General in these cases. Upon this phase of the case the court pointed out that the officers could not be so restrained unless they were personally and individually wrongdoers "against whom the complainants had a clear right of action for the recovery of the property taken or its value." In such cases it was said (p. 500):

> "The right asserted and the relief asked were against the defendants as individuals."

The court further said (p. 505):

> "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several

> States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."

Then follows the rule for the construction of the amendment quoted at the beginning of our argument on this point. The court then draws the line of demarcation between those suits against State officers which are and those which are not suits against the State itself, and says (p. 506):

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by a State, *are guilty of personal trespasses and wrongs,* nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law and the act to be *done or omitted is purely ministerial,* in the performance or omission of which the plaintiff has a legal interest."

In this case it should be observed that the only act on the part of the Attorney General sought to be restrained was the bringing of suits of a civil nature under the act complained of, the court remarking that (p. 493-4)—

> "Any such suit must by the statute be brought in the name of the State and for its use."

It was adjudged, for the reasons stated, that the Attorney General of Virginia could not be enjoined from commencing civil actions on behalf of and in the name of the State, because such an injunction would be a restraint of the State itself.

The case of Fitts *v.* McGhee, *supra*, involved an act of the General Assembly of Alabama prescribing maximum rates of toll to be charged on a bridge across the Tennessee River, known as the Florence bridge. The rates in question were alleged to be confiscatory, and the suit was originally brought against the State of Alabama; Oates, its Governor, and Fitts, the Attorney General, the relief prayed for being an injunction prohibiting the Governor and Attorney General, and all persons whomsoever, from instituting any proceeding against the complainants under the forfeiture clause of the act in question. A temporary injunction was issued, as prayed for, but the suit was subsequently dismissed as to the State. One Carmichael, the solicitor for the judicial circuit wherein several criminal prosecutions were started against officers of the bridge company for violations of the law, was subsequently joined as a party defendant. It did not appear that either the Attorney General or the solicitor of the judicial district in question were charged with any special duty as to the enforcement of the law.

On the behalf of the Governor and the Attorney General it was urged that the suit was one in effect against the State of Alabama, and this contention was finally sustained by the Supreme Court. After quoting from the Ayers case, as above indicated, the court further said (p. 528):

> "If these principles be applied in the present case, there is no escape from the conclusion that although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. As a State can only act by its officers, an order restraining those officers from taking any steps by means of judicial proceedings in execution of the statute of February 9, 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the

plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the State. In the case supposed they would be compelled to make good the State's claim to the property and could not shield themselves against suit because of their official character. Tindal *v.* Wesley, 167 U. S., 204-222. No such case is before us."

"It is to be observed that neither the Attorney General of Alabama nor the solicitor of the eleventh judicial circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9th, 1895."

Several cases were urged in this case in support of the contention that the suit was not one against the State, among them being—

The Reagan case, *supra*, and
Smyth *v.* Ames, 169 U. S., 466 (42 L. Ed., 819).

These cases will be hereinafter distinguished. Referring to the cases cited, the court said (p. 529):

"Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held

any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former, as the executive of the State, was in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizens, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against, under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is constitutional and void. And that question can be ultimately brought to this court for final determination."

In the case of Smith *v.* Reeves, 178 U. S., 436 (44 L. Ed., 1140), it was attempted to compel the treasurer of California to return to taxpayers money claimed to have been taken from them under an illegal assessment. The bill was demurred to on the ground that the suit was one against the State, and was dismissed for that reason. The court based its decision largely upon Louisiana *v.* Jumel, 107 U. S., 711 (27 L. Ed., 428), and quoted from it as follows (178 U. S., p. 440):

> "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax, * * * and that, too, in a proceeding in which the State as a State was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."

The treasurer of a State is the custodian of its moneys. The Attorney General, so to speak, is the custodian of its power, so far as litigation is concerned. Surely it is just as much the exercise of judicial power directly upon the State to compel the Attorney General to use or refrain from using its name in a certain manner in litigation pending or proposed as it is to compel the treasurer to use or refrain from using its money for certain purposes. The one is as much, and no more, an interference by the judiciary with the executive and political power of the State as the other.

These cases, and especially Fitts *v.* McGhee, establish very clearly, it seems to us, that the circuit court had no jurisdiction to entertain the suit as to the Attorney General, because—

(1st) He was not, was not claimed to be, and in no event can become, a wrong-doer or trespasser as to the complainants; and

(2d) He is charged with no special duty with respect to the enforcement of the acts complained of, his duties with respect thereto being purely discretionary and in no respect ministerial.

The learned judge who overruled this contention in the circuit court gave, as he has always given to litigants before him, a candid statement of his position. Judge Lochren's opinion will be found in Exhibit "A," attached to the petition. Upon this question he said:

"These bills of complaint are met by demurrers upon various grounds, one of which is that, being brought against the Attorney General and other State officers, but especially the Attorney General, they, in fact amount to actions brought against the State, which are prohibited, so far as the Federal courts are concerned, by the eleventh amendment to the Constitution of the United States. This matter I disposed of at a preliminary hearing contrary to that contention, holding that *although the State is interested in this matter,* these suits are not in terms nor in necessary effect, actions against the State. No property of the State is affected: no revenues of the State are affected by the result of the litigation. And although the eleventh amendment to the Constitution prohibits suits, or actions, against the State, by citizens of another State or of a foreign country, the fourteenth amendment provides that the State shall not deprive any person of life, liberty, or property without due process of law. *There must be some way to enforce that provision of the Constitution.* It is a provision which requires no action of Congress to make it effective. *It is a prohibition against the State.* And if the State by any act attempts to deprive any one of life, liberty, or property without due process of law, *the courts must provide some adequate remedy for the protection of such person.* It would be a reproach to the courts did they fail to provide an adequate remedy in a case of that sort. And it is unnecessary in these cases to hold that the eleventh amendment would be ineffective as against the later provision, in the fourteenth amendment, if *the remedy can be reached in another way;* and it seems to me that it can—*by tying the hands of the officers of the State,* if necessary, in a proper action, and restraining them from attempting to enforce or put in effect a provision of the law of the State which is unconstitutional under the terms of the fourteenth amendment. This has been done in so many cases that it seems to me it does not now require argument to sustain that position. And I therefore hold that that ground of the demurrer is not well taken." (The italics are ours.)

This language seems to us to establish absolutely the lack of jurisdiction in the circuit court. It is said that "the State is interested in this matter"; that "the eleventh amendment prohibits suits or actions against the State"; that "the fourteenth amendment provides that the State shall not deprive any person of life, liberty, or property without due process of law"; that this "is a prohibition against the State"; that the "courts must provide some adequate remedy"; that this remedy can be afforded "by tying the hands of the officers of the State."

It is true that the fourteenth amendment is a prohibition against the State, and it is also true that the courts must have power to enforce the protection secured by the fourteenth amendment, but *non sequitur* that the circuit courts of the United States have jurisdiction to entertain a suit in equity which is in effect a suit against the State and as such forbidden by the eleventh amendment.

It cannot be claimed that in order to provide an "adequate remedy" the circuit court must assume jurisdiction any more than it could be claimed that the district courts of the United States should do so upon application. The State courts are as fully bound to give effect to the Constitution of the United States as are the Federal courts, and if this suit could have been properly maintained in the circuit court, it could likewise be properly maintained in the courts of the State.

The necessity for an adequate method for securing to the complainants the protection of the provisions of the fourteenth amendment against the act of the State seems to have been the controlling consideration in the mind of the learned trial judge. This apparent necessity was taken as sufficient justification for disregarding the eleventh amendment. If, therefore, no such necessity exists or if under the judicial system of the United States both amendments can be given effect that course must be followed. This can be done by any person, when he is proceeded against by the

State, invoking for his protection the provisions of the fourteenth amendment, and such action upon his part entitles him finally to a hearing in this court. We submit that a complete answer to this position of the circuit court is found in the opinion in Fitts *v.* McGhee, *supra* (p. 530):

> "* * * Under the view we take of the question the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

It seems to us entirely clear that the learned circuit judge frankly stated his purpose to tie the hands of the State "by tying the hands of the officers of the State." And he said further:

> "This has been done in so many cases that it seems to me it does not now require argument to sustain that position."

It is evident from this language that the reasoning of this court in certain cases to which we will now refer was entirely misconstrued by him.

It is true that in the Reagan case, *supra,* the Attorney General of Texas was joined as a party defendant; but in that case he was charged by section 19 of the act complained of with the special duty of instituting suits in the name of the State for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals under section 17 thereof. By sections 15 and 16 heavy penalties were sought to be imposed upon the companies for violating any provisions of the law and upon their officers, these penalties being payable to the State. It is obvious, therefore, that these, the duties of the Attorney General, were in

no sense discretionary and, on the contrary, were of a ministerial character. The decision of the court was based in part upon section 6 of the act, which was construed as a consent on the part of the State to be sued in the manner then attempted to be followed. Aside from this, the court based its finding upon those cases, holding that the State officers may be sued to recover money unlawfully taken by them in behalf of the State, or "in a proper case where the remedy at law is inadequate for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a *plain legal duty purely ministerial.*"

Citing with other cases—

Osborn *v.* Bank, *supra.*

Davis *v.* Gray, 16 Wall., 203 (21 L. Ed., 447).

Board of Liquidation *v.* McComb, 92 U. S., 531 (23 L. Ed., 623).

The Reagan case is therefore easily distinguishable from the suit now being considered. There the duty of the Attorney General was purely ministerial, whereas here there is nothing of that character about the duties devolving upon the Attorney General. Any action he could bring would be commenced as the result of his uncontrollable discretion, vested in him as one of the constitutional executive officers of the State—a discretion of equal grade and of as high a character as that of the Governor.

Coming now to the case of Smyth *v.* Ames, *supra,* we find a state of facts similar in principle to those in the Reagan case. The Attorney General of Nebraska was joined, not by virtue of his official character as the chief law officer of the State, but by reason of his being one of the members of the Nebraska Board of Transportation, which was charged with the duty of enforcing the freight law there attacked on the ground that it was confiscatory and therefore unconstitutional. The act, like the Texas law, imposed heavy pen-

alties recoverable by the State, and the Board of Transportation, of which the Attorney General was a member, was expressly charged with the duty of enforcing the law and the collection of the penalties thereby imposed. The contention that the suit was one against the State was overruled for that reason, Mr. Justice Harlan writing, expressly basing his opinion as to this phase of the case upon the ground that—

> "* * * within the meaning of the eleventh amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of the State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of that amendment."
>
> 169 U. S., 518; 942 L. Ed., 839.

The case of Fitts *v.* McGhee was decided after both the Reagan case and Smyth *v.* Ames, and is the last and controlling declaration of the law, and is to the unqualified effect that a suit against the Attorney General of a State to restrain or otherwise control his official action in any matter wherein he is not charged with a purely ministerial duty and wherein he is not a personal wrong-doer, but where his action is discretionary, is a suit against the State and within the prohibition of the eleventh amendment.

The opinion in the Reagan case was written by Mr. Justice Brewer; the opinion in Smyth *v.* Ames was written by Mr. Justice Harlan, as was also the opinion in Fitts *v.* McGhee. Mr. Justice Brewer also wrote the opinion in Cotting *v.* Godard, 183 U. S., 79 (46 L. Ed., 92).

This court therein dismissed the suit as to the Attorney General of Kansas, who had been joined as a defendant and who raised the objection that as to him the suit was against

the State. The action was of the same nature as these cases It was a stockholders' action against the Kansas City Stock Yards Company and its officers and the Attorney General to prevent a compliance by the company with a law fixing the rates to be charged at the stock yards and to prevent the Attorney General from proceeding to enforce the law. The objection that the court had no jurisdiction because the suit was one against the State was not taken until after a full hearing upon the merits and just before final decree. The court declined to express any opinion upon this question as to its merits, "if it had been properly and seasonably presented," but notwithstanding the suit was dismissed as to the Attorney General. Fitts *v.* McGhee was cited by the Attorney General in support of his contention as to this phase of the case.

The case of Prout *v.* Starr, 188 U. S., 537 (47 L. Ed., 584), was a sequel to Smyth *v.* Ames. The decision in the latter case was decisive of several suits brought by certain stockholders of each of the railroad companies operating in Nebraska. One of these cases was against or on behalf of the Chicago, Rock Island and Pacific Railway Company. The original bills were filed against the companies, the Board of Transportation, and Geo. H. Hastings, then Attorney General, who was sued, as above stated, because he was a member of the said board. No testimony was taken in the Rock Island case, but it was stipulated that the proofs taken in the Smyth case should control, and that the Rock Island case should abide the result of and be determined by the decree in the Smyth case. (Smyth *v.* Ames was the case brought by the stockholders of the Union Pacific Railway Company, and although Smyth was not a party to it originally, not being then in office, we use his name in referring to it here for convenience.) Hastings was succeeded in office by Smyth.

"Overlooking or disregarding the preliminary injunction * * * and the agreement that this case should abide the result in the other cases," Smyth as Attorney General com-

menced an action in the Supreme Court of Nebraska against the Rock Island Company to enforce the collection of penalties alleged to have accrued under the rate law, amounting to $310,000. Upon his attention being called to the injunction of the circuit court and the agreement that the Rock Island case should abide the result of the Union Pacific case, Smyth agreed that before the expiration of his term of office he would dismiss the action. Thereafter Smyth was succeeded by Prout in office, and the latter declined to dismiss the action in the Supreme Court of Nebraska. Thereupon the complainant in the action pending in the circuit court by supplemental bill setting forth the foregoing facts, prayed that the injunction previously issued be extended to and against Prout as Attorney General, and that he be enjoined from further prosecuting the action in the State court to collect the penalties claimed to have accrued under the rate law. Prout resisted this supplemental bill by demurring on the ground that it was filed against the State, and that therefore the court was without jurisdiction. This demurrer was overruled.

From the foregoing statement it will be seen that the Attorney General's action was an effort to secure the reversal of what had already been decided in Smyth *v.* Ames, and that the attempt was in direct violation of a stipulation entered into by his predecessor and binding upon him. It had already been decided that the circuit court had jurisdiction and Attorney General Prout's effort to transfer the matter to the State court was properly considered a violation of the stipulation entered into by Attorney General Smyth and also as an attempt to reverse the law of the case. The court's reference to Smyth *v.* Ames sustains our construction of the law and our view of the effect of that decision.

It was said (p. 544):

> "It is true that the defendant (in Smyth *v.* Ames) was included in the bill as the attorney general of the State, but that was *because he was one of the board of transportation, which was directed to en-*

> *force the provisions of the act.* * * * The injunction must be so read and understood."

The case of Gunther *v.* Atlantic Coast Line R. R. Co., 200 U. S., 273 (50 L. Ed., 477), contains a reference to Prout *v.* Starr which shows conclusively that that case did not present an instance of the exercise of original jurisdiction by the Federal court. On the contrary, the jurisdiction there exercised was ancillary and in aid of the jurisdiction which had already attached to the subject-matter of the controversy and the parties thereto. Prout *v.* Starr was so manifestly an effort to reopen a controversy already finally determined that no other result than the one reached was possible.

In the Gunther case it was held that the suit could be maintained because the matter in controversy had already been determined in a suit to which the State was voluntarily a party and wherein the entire matter had been completely litigated and finally determined. This decision contains what is probably the last declaration of the Supreme Court upon the question now in controversy. The statement of the rule is so conclusive as to the correctness of our position that we quote it here.

On page 291 (L. Ed., 487), Mr. Justice White writing, it is said:

> "It is insisted that the court below had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the State courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the eleventh amendment and the provisions of section 720 of the Revised Statutes, forbidding the granting of a right by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to

proceedings in bankruptcy. *The soundness of the doctrine relied upon is undoubted.*"

Citing *In Re* Ayers and Fitts *v.* McGhee, *supra.*

It was held that this doctrine, though undoubtedly correct, was inapplicable to the case under consideration.

The rule we are contending for, prohibiting injunctions against State officers unless they are actual or threatened personal wrong-doers or are acting in a purely ministerial capacity, has never been departed from by this court. We have laid special stress upon the Ayers case and Fitts *v.* McGhee, because, as to the facts involved, they are on all fours with the suit in the circuit court in which the injunction was granted.

In 1875, in Board of Liquidation *v.* McComb, *supra,* the rule was thus stated by Mr. Justice Bradley (p. 541):

> "The objections to proceeding against State officers by *mandamus* or injunction are: First, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of the executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that when a plain official duty requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

Again, in Pennoyer *v.* McConnaughy, 140 U. S., 1 (35 L. Ed., 383), and in *Ex parte* Tyler, 149 U. S., 164 (37

L. Ed., 689), the rule was stated, after an examination of the authorities, to be—

> "* * * that where a suit is brought against defendants who, claiming to act as officers of a State and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case, to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State."

To the same effect is Scott *v.* Donald, 165 U. S., 58 (41 L. Ed., 632).

Wherever the statement of the rule appears in the decisions of the Supreme Court, it will be found that, when applied to the suit in the circuit court, it shows that court to have been without jurisdiction, because the Attorney General is not an actual or threatened personal wrong-doer and is not acting in a purely ministerial capacity. Here the Attorney General was not threatening any wrong as to any of the complainants or any of the railroad companies, nor does he owe to them any "plain legal duty purely ministerial."

Passing to the decisions of the circuit and district courts, we find that they have, without exception, until recently, followed the rule as laid down in the Ayers case and in Fitts *v.* McGhee.

In Ball *v.* Rutland Railroad Co., 93 Federal, 513, certain stockholders were suing a railroad company, the Railroad Commissioners of the State, and the State's attorneys of the several counties through which the road ran to prevent the enforcement of an act of the Legislature requiring railroad companies to sell 1,000-mile-coupon mileage books at the rate of two cents per mile. It was objected, on behalf of the

State officers, that the suit was one against the State. The opinion here quoted from was on a motion for a preliminary injunction. The act provided for prosecution by the State's attorney in any county where there should be a violation. It was observed that (p. 517)—

> "Nothing can be done, if attempted, but by judicial proceedings; and the judges of the State courts are expressly as much bound by these Constitutional provisions as any judges, and would of course as scrupulously regard them."

The court referred to Fitts *v.* McGhee as controlling and quoted therefrom at length, especially calling attention to the language used by the Supreme Court in that case relative to the attempted "convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals," and stating that "it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In concluding his opinion, Judge Wheeler said (p. 518):

> "None of the State officers here are alleged to be about or to threaten to interfere in any way with the property or operation of this railroad company, *but through and at the end of legal proceedings in behalf of the State as mentioned.* * * * No reason for any injunction against these officers now appears."

In Farmers' National Bank *v.* Jones, 105 Federal, 459, the circuit court refused to maintain a bill in equity praying for a mandatory injunction against a board of public officers. The reason for the decision was that such a suit cannot be maintained, *unless the act sought to be coerced is a purely ministerial one enjoined on the defendants by positive requirement of law which leaves nothing to their discretion.*

The case of Western Union Telegraph Company *v.* Myatt, 98 Federal, 335, the decision wherein was written by Mr.

Justice Hook, was a suit in the circuit court against the members of the Kansas court of visitation and the State solicitor, who was the special prosecuting officer of that court and who was specially charged with the duty of enforcing its "decrees." The penalty for disobedience of any decree of the court of visitation was the sequestration of the property of the offending corporation and the appointment of receiver. The suit was held not to be one against the State, because the defendants were not general officers of the State, *"but officers expressly charged with the duty of enforcing railroad and telegraph regulations and rates, under powers specially conferred upon them for that purpose."* (See Syllabus, par. 8.)

After comparing Smyth *v.* Ames and Fitts *v.* McGhee (page 357), the learned judge says:

> *"It will be noticed that in the case at bar the defendants, * * * are specially charged with the enforcement of the State enactments under consideration, and that they are not otherwise general officers of the State or charged with the enforcement of all laws generally."*

In Haverhill Gas Light Co. *v.* Barker, 109 Federal, 694, the facts were similar to those in Western Union *v.* Myatt. It was a suit against a gas commission and an Attorney General expressly charged with the enforcement of a statute. It was the special duty of the Attorney General to enforce the orders of the commission in the courts. The suit attacked the validity of an order made by the commission and was to prevent its enforcement, and was sustained. It was held not to be a suit against the State on account of the ministerial character of the duties imposed upon the defendants. Fitts *v.* McGhee was recognized as authority for the conclusion that if the officers had not been charged with special duties the result would have been different.

The rule that in order to sustain a suit against State officers, as against an objection that the suit is one against the State, the officers must be actual or threatened personal

wrong-doers is recognized in Manchester Fire Insurance Co. *v.* Harriott, 91 Federal, 711 (715).

The case of Union Trust Co. *v.* Stearns, 119 Federal, 790, was before the court on demurrer to the bill. Two of the defendants were the Attorney General and the Assistant Attorney General of the State of Rhode Island, the relief sought against them being an injunction to prevent the institution by them of criminal prosecutions in the name of the State under a State statute, by which they were charged with no special duty and to which they bore no different relations than to every other penal statute of the State. The suit was held to be one against a State, within the meaning of the eleventh amendment.

The opinion was written by Circuit Judge Colt, and in the course of it he said (p. 791)

> "The defendants Stearns and Greenough are not named in the act nor charged with any special duty in connection therewith. They do not occupy any different relation with respect to this penal statute than with respect to other penal statutes of the State. It is their duty * * * to institute proceedings for the enforcement of this statute, just as it is their duty to institute proceedings for the enforcement of other penal laws. They are threatening to do no wrong or trespass against this complainant in any other sense than is involved in the threatened prosecution of all violators of the criminal laws of Rhode Island. If they can be restrained from instituting prosecutions under this act, they equally may be restrained from instituting prosecutions under any criminal law of the State. In this way the enforcement of every criminal statute of the State might be enjoined by a bill in equity brought in the federal courts against these defendants, until the question of constitutionality has been finally passed upon by the Supreme Court of the United States.
>
> "The purpose of the present bill, in substance and effect is to enjoin the State of Rhode Island from the enforcement of a penal statute. Indictments under the act are brought in the name and on behalf of the

State for the protection of the State. These defendants, the Attorney General and his assistant, merely represent the State in such proceedings. They are simply the officers and agents of the State. It is not as individuals, but solely by virtue of their holding such offices, that they prefer and prosecute indictments in the name of the State. A State can only act or be proceeded against through its officers. If a decree could be entered against the State of Rhode Island, enjoining prosecutions under this act, it could only operate against the State through enjoining these defendants. An order restraining the Attorney General and his assistant from the enforcement of this statute is an order restraining the State itself. The present suit, therefore, is as much against the State of Rhode Island as if the State itself were but named as a party defendant."

Citing—

Ex parte Ayers.
Fitts *v.* McGhee.
Cotting *v.* Godard, *supra.*

With respect to these three cases Judge Colt said (page 793):

"These decisions have never been questioned and they are controlling and binding on this court in the case at bar."

This decision was handed down January 6, 1903.

From this examination of the authorities, it appears to be as true now as it was when Mr. Justice Matthews wrote the opinion in the Ayers cases, that (p. 500)—

"The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the person or property rights of the complainant, for which they are personally and individually liable.

"* * * This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State

> or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered, apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrong-doer in his individual character."

The "vital principle" thus found to be necessary in order to sustain suits against State officers is entirely absent from the case in the circuit court. The bill may be searched in vain for any showing that Mr. Young has committed, or was about to commit, any personal wrong or to trespass upon the rights of the complainants or the railway company, or that he owed to them, or any of them, any plain legal duty of a purely ministerial character of a negative or affirmative nature. On the other hand, it does appear that he is charged with no special duty with respect to the orders or laws complained of, and that all of his duties are of a general executive character, in the exercise of which his discretion is absolutely uncontrolled. There is no case holding that such a suit will lie. On the contrary, all the cases do hold that such suits against State officers are suits against the State itself.

It cannot be said that the Attorney General was an actual wrong-doer, or that he was threatening to become such; it was only claimed that he threatened to commence actions against the company, wherein all rights and defenses could be urged and fully litigated. The commencement of such an action is not a wrong, nor is it a violation of any private right within the reason of the cases where such actions have been sustained; neither is it a mere ministerial duty or an act in the performance or non-performance of which the complainants or the company have any right. The State cannot take private property without due process of law and without making just compensation therefor; neither can it deprive

any citizen of the equal protection of the laws. It cannot confer upon its officers authority to do any of these things. Any law attempting to do it furnishes no protection to the officer proceeding thereunder when sued as a wrong-doer. Like any other agent, he cannot invoke the rights and liabilities of his principal except within the scope of his lawful authority.

In the suit we are considering it was not charged, nor could it be charged or assumed, that Mr. Young was about to violate any personal or property rights. It was charged only that he might commence certain actions, the purpose of which would be first to establish validity of and then to enforce the laws attacked. Mr. Young is commanded by no law to bring such actions. He might or might not decide to sue. Certain it is that no individual or corporation can by suit compel him to sue. It ought to be equally true that no individual or corporation can prevent him from suing. No citizen or officer of the State has any control over him in the premises. The Governor is powerless to influence his action and the courts ought to be. His discretion is uncontrolled, and for its exercise he is answerable to no one save to the people who elected him. He owes no duty to the railway company or its stockholders to bring or not to bring the actions which complainants claimed he proposed to commence, and if in the exercise of his discretion he does sue, he is violating no individual rights.

The character of the rate laws, as constitutional or unconstitutional, has nothing to do with the right of the State to test their validity in any appropriate proceedings in the courts. An action of mandamus is not in the first instance an action to enforce a law. Its first office is to test the law under which the proceeding is had, if its validity be questioned. It becomes an action to enforce the law only after the same is found valid. If invalid, laws cannot be enforced; but, even though they are invalid, the State has the right to commence an appropriate action to test their va-

lidity. If a carrier affected considers the rate laws unconstitutional, he is at liberty to defend upon that ground. In no event can an action to test such laws commenced by and in the name of the State be anything less than a rightful act of sovereignty. In no case can it be a wrong to individuals or a trespass upon private rights. It would be the discretionary rightful act of an executive official, who in the performance of his duties is free from judicial control.

Any individual litigant has the right to commence an appropriate action to secure a right given him by law, and his adversary may defend on the ground that the law is unconstitutional, or his opponent may anticipate the action and himself commence suit to test the law. Herein lies the difference between the State and the ordinary litigant, for no adversary can sue the State. Because of its sovereign character, he must wait until sued by it, and then set up whatever defenses he may have. In a spirit which seems contemptuous, the complainants in the circuit court have sought to wipe out this distinction between the sovereign and the individual, and to reduce the State to the level of the individual. The suit was obviously an effort to deprive the State of Minnesota of its immunity from suit and its right to choose its own time and form of proceeding, and to subject it to the direct restraint of judicial power in a suit directly against it.

Immunity from suits by the State is not among the immunities of the citizen. If the suit now being considered will lie, it must be because the railway company has substantial immunities in addition to those of the ordinary citizen. Complainants in that suit claim in effect that the corporation of which they are stockholders is, or ought to be, free from suits by the State of Minnesota, and they asked the circuit court to restrain the State from commencing suits against them. Their claim is absolutely without merit, unless, in addition to the privileges and immunities of the individual citizen, railroad corporations have immunity from suits by the State and are further vested with sufficient

of the attributes of sovereignty to enable them to commence actions against other sovereigns. If it were the duty of the Governor to direct suits to be brought, or if, there being no Attorney General, it was the duty of the Governor to retain counsel and commence suits, could he be restrained by the courts? Would not such restraint be judicial interference with executive action? In the case supposed, if the Governor was not an actual or threatened violator of personal rights, and was not acting in response to a mandate of law whereby his action became ministerial, there could be but one answer to these questions, and that would be to the effect that such suits would be against the State itself. The Attorney General, in his sphere and in his control over litigation wherein the State is a party, is just as independent of judicial control as is the Governor. His duties are as purely discretionary.

Whether or not the law is constitutional is a judicial question. Whether or not a suit shall be brought by the State to test a law and enforce the State's rights, if it is found valid, is an executive question to be passed upon only by the Attorney General. His action in the premises cannot be controlled by the courts, for such control would be judicial interference with executive action.

We respectfully submit that a court should no more attempt to control the State by restraining its executive officers from bringing an action to test and enforce a law, which would not in any way invade personal rights than to attempt to enjoin the Legislature from passing the law in the first instance, or to restrain the Governor from approving it.

With few exceptions, whereof the Supreme Court is given jurisdiction, it is declared that the States shall not be sued without their consent. This is a declaration that, as to questions wherein they are interested, the States may commence actions where and when they will, and that, until such time as they choose to institute proceedings, they shall be immune from suit by individuals. Here we have an at-

tempt by the complainants in the suit in the circuit court, or their stockholders, to shear the State of this right and strip it of the accompanying immunity.

They further assert that they have the right to take the initiative and to bring suits against the State when and where they will, and without its consent, and in the meantime they seek to secure immunity from suits by the State by means of an injunction restraining the only official who can commence such suits. They in effect assert that they, rather than the State, are protected by the eleventh amendment. They ask the court to take away from the State and to secure to themselves immunity from suits.

Viewed in all its aspects, we know of no bolder attack upon the reserved rights of the State and its sovereign privileges and immunities than was made by the complainants in that suit. We are entirely conservative when we repeat that it was an attempt by complainants to control the State of Minnesota instead of submitting themselves to its control, and this attempt is made directly upon the State at a point wherein its rights are expressly guaranteed by the Constitution of the United States. Nothing rests upon implication.

It is therefore respectfully submitted that the circuit court making the order for a temporary injunction had no jurisdiction in the suit in which the order was made; that the order restraining and enjoining the petitioner as Attorney General of Minnesota was beyond the jurisdiction, power, and authority of that court and was therefore a nullity; that the order punishing him for a violation of such void order is also null and void, and that the petitioner, being now unlawfully restrained of his liberty, should be discharged.

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Office Supreme Court, U. S.
FILED.
DEC 2 1907
JAMES H. McKENNEY
CLERK

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

NO. 10 ORIGINAL.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, *Petitioner.*

BRIEF FOR PETITIONER ON HEARING OF RULE TO SHOW CAUSE.

THOMAS D. O'BRIEN,
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CHARLES S. JELLY,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

NO. 10 ORIGINAL.

IN RE EDWARD T. YOUNG, *Petitioner.*

BRIEF FOR PETITIONER ON HEARING OF RULE TO SHOW CAUSE.

STATEMENT OF FACTS.

On the 21st of October, 1907, an order was made by Honorable William Lochren sitting as Judge of the United States Circuit Court for the District of Minnesota, Third Division, adjudging the petitioner, Edward T. Young, the Attorney General of Minnesota, guilty of contempt of that Court and directing that he be fined the sum of One Hundred Dollars ($100.00); that he dismiss a *mandamus* proceeding brought by him in the name of and in behalf of the State, in the District Court of the Second Judicial District of the State of Minnesota and that he stand committed to the custody of the Marshal until the order was obeyed.

Mr. Young presented his petition for a writ of *habeas corpus* to this Court on the 25th of October, 1907, and on the 28th of that month, an order was entered granting leave to file the petition and directing that a rule be entered requiring the Marshal of Minnesota to show cause why the writ should not be issued.

The following is a brief history of the proceedings culminating in the order adjudging the petitioner guilty of contempt.

On September 6th, 1906, the Railroad and Warehouse Commission of the State of Minnesota made an order fixing the rates to be maintained by Railroad Companies for the carriage of merchandise between stations in Minnesota of the kind and classes included in and specified by what is known as the "Western Classification," that being a system adopted by all of the railroads operating in Minnesota and adjacent states for the rating of a great part of the freight carried by them.

This order took effect November 15, 1906, *and schedules in accordance therewith were filed and published by the Railway Companies and they have ever since that time carried the merchandise included within the "Western Classification" at the rates named therein.*

Another and important class of freight is not included in this "Western Classification." The practice of the Railroad Companies has been to establish a special rate for such articles as grain, grain products, lumber, live stock and coal when carried in carload lots. These particular rates are referred to in railroad terminology as "Commodity Rates," and the order of September 6th had no effect upon them.

On April 18th, 1907, there was approved an act of the Legislature of the State of Minnesota establishing rates for the transportation of these so-called "Commodities" between stations in the State of Minnesota. This act is now Chapter 232 of the Laws of Minnesota for the year 1907. The act, after dividing the commodities to which it refers into seven classes, numbered eleven to seventeen inclusive, setting forth a schedule of maximum rates for each class when transported in carload lots and establishing the minimum weight which constitutes a carload of each class, provides:

> "Section 4. No Railroad Company which is a common carrier of property within the State of Minnesota shall charge, take or receive any greater sum for carrying within this state, between stations therein, any of the commodities named in this act, than the respective amounts set forth and provided in Section two of this Act for the respective distances therein named.
>
> Section 5. This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State. Whenever, in a proceeding regularly pending before the Railroad and Warehouse Commission, it shall be made to appear to the satisfaction of said Commission that the rates herein prescribed are unreasonable, it may, by order fix higher or lower rates for the transportation of any of the commodities herein mentioned over the line of any railroad in this State, and such rates, when so fixed shall supersede the rates herein prescribed upon said line of railroad and shall be enforced as prescribed by the law relating to such orders, but until such order shall have been made by said Railroad and Warehouse Commission, the rates herein prescribed shall be the exclusive legal maximum rates for the transportation of the

commodities herein enumerated between points within this State.

Section 6. Every railroad company transacting the business of a common carrier within this State shall adopt and publish, and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this State of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company, exercising any authority, or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use of such railroad company of rates not exceeding those specified in this act; and any officer, director, or such agent or employe of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company, to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.

Section 7. If, at the time of taking effect of this act, any railroad is maintaining a rate between any two stations in this State that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

Section 8. This act shall take effect and be in force from and after June 1, 1907."

On the 4th day of April, 1907, there was approved an act of the Legislature fixing two cents per mile as the maximum passenger rate to be charged in Minnesota. This latter act took effect May 1st, 1907, and was put into effect upon that date by the Railroad Companies and has ever since been observed by them.

On May 31, 1907, the day before the law fixing the Commodity Rates (Chapter 232) to take effect, nine suits in equity were commenced in the Circuit Court of the United States for the District of Minnesota, Third Division. Each suit was brought by one or more stockholders of one of the Railroad Companies operating in Minnesota and in each case, among the defendants named were the Railway Company, of which the complainants were respectively stockholders, the members of the Railroad and Warehouse Commission of the State of Minnesota and the petitioner, Attorney General Edward T. Young.

The suit in which the order adjudging the petitioner guilty of contempt was made was one of these, wherein Charles E. Perkins, a citizen and resident of the State of Iowa, and David C. Shepard, a citizen and resident of the State of Minnesota, were complainants and the following were defendants: Northern Pacific Railway Company (a corporation organized under the laws of the State of Wisconsin), Edward T. Young (this petitioner), Ira B. Mills, Charles F. Staples and William E. Young (the members of and constituting the Board of the Railroad and Warehouse Commission) and E. A. Ewert, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph Michaud.

Each of the defendants named, except the Northern Pacific Company, are residents and citizens of the State of Minnesota, the last six named defendants being private citizens joined as shippers interested in freight rates and described as representing a class too numerous to be all named as defendants. The character and

purposes of the suit were described in Paragraph 3 of the complaint as follows:

> "This is a suit in equity arising under the Constitution of the United States for that your orators seek to enjoin said defendant Northern Pacific Railway Company from publishing or adopting or continuing to observe or keep in force, if the same have been published or adopted, certain rates, tariffs and charges prescribed or set forth in two certain Acts of the Legislature of the State of Minnesota and two certain Orders of the Railroad and Warehouse Commission of said state hereinafter specifically described, and to enjoin the other defendants herein, and each thereof, from attempting in any manner to enforce the provisions of said Acts or Orders, or either thereof, or from instituting any action or proceeding against said defendant Railway Company, its officers, directors, agents or employes on account of any violation thereof, for the reason that the said Acts and Orders, and each of them, and all the tariffs, rates, charges, regulations, schedules and classifications therein assumed to be prescribed, and each of them, are violative of the Constitution of the United States."

The bill described two orders of the Commission, but as the second was merely an extension of the first prescribing distributing rates for certain named stations, they have been treated as one.

The bill of complaint (Paragraph 2) described the defendant Edward T. Young *as the Attorney General of the State of Minnesota* and the defendants, Ira B. Mills, Charles F. Staples and William E. Young, as members of and constituting the Railroad and Warehouse Commission.

Certain amendments were subsequently allowed to the bill and in its final form, the bill contained allegations to the effect that the enforcement of rates and charges provided for in the order of the Railroad and Ware-

house Commission and the two Legislative Acts would in practical operation interfere with and burden interstate commerce; that obedience to the Order and Legislative Acts by the Railway Company would constitute unlawful discrimination and further that the order of the Commission and each of the Legislative Acts was void inasmuch as the rates prescribed in each were so low as to deprive the Railway Company of its property without due process of law or without just compensation and prayed relief in part as follows:

> "That said Acts of the Legislature of the State of Minnesota, and each of them, and said Orders of said Railroad and Warehouse Commission, and each of them, be declared to be in violation of the Constitution of the United States and therefore void and of no effect. * * *
>
> That the said Edward T. Young, as Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and William E. Young, as the Railroad and Warehouse Commission of the State of Minnesota, be temporarily and permanently restrained and enjoined from any attempt to compel said Railway Company to observe, publish, post, or put in force said rates, or any of them, as fixed by said Order of September 6, 1906, or said Order of May 3, 1907, and further be temporarily and permanently restrained and enjoined from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employes, to enforce any penalties or remedies for the violation by said Railway Company of said Orders or either of them.
>
> That said Edward T. Young, as Attorney General, be temporarily and permanently enjoined and restrained from taking any action, step or proceeding against said Railway Company, its officers, agents or employes, to enforce the penalties and remedies specified in said Acts of April 4, 1907, and April 18, 1907, or either of them."

The only relief asked in reference to Chapter 232, embodying the commodity rates was an injunction against *petitioner as attorney general.* That was the only relief granted by the temporary injunction. There is, therefore, no other State officer involved in this branch of the controversy now before this Court.

Upon the filing of the bill, subpoenas were issued and served upon the defendants and in addition, an order to show cause why the enforcement of the rates should not be temporarily enjoined was issued which contained the following direction:

> "That in the meantime, and until the further order of the Court in the premises, the said defendant, Edward T. Young, Attorney General of the State of Minnesota, is hereby restrained from taking or causing to be taken any action, step or proceeding against said Railway Company, its officers, directors, agents or employes, to enforce the penalties and remedies specified in said Act approved April 18, 1907."

On the 1st day of July, 1907, the Attorney General entered a special appearance and moved that the suit be dismissed as to him for the reason:

> "That it appears by the said bill that the same is exhibited by the complainants against this defendant as, and only as, the Attorney General of the State of Minnesota, and that the relief sought and prayed for therein is the restraint of him, the said Edward T. Young as Attorney General aforesaid, by writ of injunction from proceeding in his official capacity, and not otherwise, and in the exercise of an executive discretion thereby vested in him to commence the appropriate action or actions in the name of and on behalf of the said State of Minnesota, thereby restraining the State of Minnesota from proceeding by appropriate action or actions to enforce certain of its laws or to test the validity

> of the said laws, the said suit being, therefore, in truth and in effect a suit against the said State of Minnesota as a party defendant, commenced against it without its consent, contrary to the Eleventh Amendment of the Constitution of the United States."

This motion was argued upon the 8th day of July and was denied. Upon the same day, the Attorney General moved that the order to show cause be dismissed as to him upon the same grounds urged by him for a dismissal of the bill. This motion was also denied, Judge Lochren rendering an oral decision in which he said:

> "I think, therefore, that if the showing shall be such that it will appear to the Court that an injunction should issue, then the Attorney General should be included in it; and that this is not within the decisions of the Supreme Court (a) suit against the State, but against the Attorney General as an officer charged with the enforcement of these acts which are claimed to be unconstitutional."

Thereupon the Attorney General interposed a demurrer in which he reiterated his claim that as to him the suit was in effect one against the State of Minnesota; that the Court was without authority to control the exercise of the executive discretion vested in him and further set forth that the bill was multifarious and contained no facts sufficient to show that the complainants were entitled to any relief and failed to show a compliance with the 94th Equity Rule. The members of the Commission as well as some of the other defendants likewise demurred.

The order to show cause came on for hearing on September 3rd, upon the demurrers so filed together with the showing upon the merits presented by the com-

plainants on the one side and the members of the Railroad and Warehouse Commission on the other, and on the 23rd of that month, Judge Lochren rendered an oral decision, a transcript whereof is attached to the petition and directing the issuance of a temporary injunction restraining the enforcement of the Act of April 18, 1907 (Chapter 232), embodying the commodity rates, but refused to interfere by preliminary injunction with the maintenance of the rates established by the order of September 6th or of the passenger rates established by the Act of April 4, 1907, which had gone into effect.

The temporary injunction issued pursuant to this order contained the following direction:

> "That the defendant, Edward T. Young, as Attorney General of the State of Minnesota, be restrained and enjoined, pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said Act, or either thereof, or to compel obedience to said Act or compliance therewith or any part thereof."

On the 24th day of September, 1907, Mr. Young presented to the District Court of the Second Judicial District of the State of Minnesota, a petition for an alternative writ of *mandamus* in which the State of Minnesota, on his relation as Attorney General, was plaintiff, and Northern Pacific Railway Company was defendant. The petition set out the passage of Chapter 232, Laws of Minnesota for the year 1907 and the failure of the defendant company to comply with its provisions. The prayer for relief contained in the petition was as follows:

> "WHEREFORE, SAID PETITIONER prays that this

Honorable Court make and enter its order, directed to said defendant Northern Pacific Railway Company, commanding and directing that it forthwith adopt and publish, as provided by law, as its rate and charge for the transportation of freight between stations in the State of Minnesota of the kind, class and character described in Chapter 232, Laws of 1907, of the State of Minnesota, a rate and charge no higher than the rate and charge fixed and named in said Chapter 232 therefor, and that said defendant, Northern Pacific Railway Company, its officers, agents, employes and servants refrain from asking, demanding or receiving for the transportation of commodities of the classes and kinds named in said Chapter 232 between stations in the State of Minnesota any greater sum than the respective amounts specified in said law as just, equal and reasonable for such shipment; or to show cause, if any there be, before this Court at a time and place to be specified, why such order should not be made and for such other and further relief in the premises as may be just."

Thereupon, an alternative writ of *mandamus* was allowed and was issued and duly served upon the Northern Pacific Railway Company.

Upon the affidavit of Mr. Jared How, one of the solicitors for the complainants in the suit in the Circuit Court in which the injunction was issued, a rule was entered by that Court ordering Mr. Young to show cause why he should not be punished for contempt because of the institution of the *mandamus* proceedings in the State Court, and on the 21st day of October, 1907, after a hearing the following order was entered in the Circuit Court:

"This matter came on this day to be heard upon the order heretofore issued against Edward T. Young, Attorney General of the State of Minnesota,

to show cause why he should not be punished as for a contempt for his misconduct in failing to obey the order for a temporary injunction entered in this cause under date the 23rd day of September, 1907. After hearing counsel and upon consideration of the matter,

IT IS ORDERED AND ADJUDGED, that the said Edward T. Young is guilty of contempt in his failing to obey such order.

ORDERED FURTHER, that said Edward T. Young forthwith dismiss or cause to be dismissed the suit of the State of Minnesota on the relation of Edward T. Young, Attorney General, Plaintiff, vs. Northern Pacific Railway Company, Defendant, heretofore instituted by him in the District Court of the County of Ramsey, Second Judicial District, State of Minnesota.

ORDERED FURTHER, that for his said contempt said Edward T. Young be fined the sum of One Hundred Dollars ($100.00) and stand committed in the custody of the Marshal of this Court until the same be paid and until he purge himself of his contempt by dismissing or causing to be dismissed said suit last herein mentioned."

The Attorney General immediately presented his petition to this Court praying the issuance of the writs of *habeas corpus* and *certiorari* and that he be discharged from custody.

The claim of the petitioner is that the Circuit Court making the order punishing him for contempt was without jurisdiction as to him in the suit or action in which that order was made. That the order directing a temporary injunction was beyond the power and authority of the Court, and that Court therefore was without authority or jurisdiction to make the order punishing him for contempt.

In support of this claim we submit the following:

1.

There was no diverse citizenship between the parties to the suit, nor was any federal question involved therein.

2.

The control of the discretion vested in an executive officer is not within the power or authority of the judiciary.

3.

The suit in the Circuit Court was in effect a suit against the State of Minnesota.

ARGUMENT.

The brief presented with the application for leave to file a petition in this matter was necessarily prepared so hastily that we have thought best to attempt some elaboration of the petitioner's claim. In doing so, it will be impossible to avoid repetition of most, if not all of the former brief, and in excuse for this perhaps unnecessary elaboration and reiteration of our position, we can only plead the great and unusual importance which will attach to the decision of this case.

We realize fully that in the exercise of its police powers, the State should proceed with the greatest deliberation and fairness and that when exercising this power in the regulation of great corporations performing a public service as great and as far reaching as that rendered by railroads, public officers through whose initia-

tive it is wielded are charged with a high degree of responsibility not only to the public whose servants they are, but to the corporations to be affected. It is of the highest importance that the "power to regulate," should be firmly and fearlessly exercised and yet be not used as a "power to destroy."

There is also the same present necessity that the well settled methods of judicial procedure remain undisturbed, that the lines establishing the borders not only of Federal and State jurisdiction but those establishing the respective powers possessed by the Executive, Legislative and Judicial branches of government be maintained, for it is apparent that the attempt by either one of those departments to unduly extend its powers, so as to arrogate to itself any of the duties which have heretofore been confined to another department, will inevitably be resented and lead to reprisals and confusion, to evils which none of us would undertake to predict or limit.

We believe that the main question presented in this proceeding is an important and pressing one. Citizens of the United States recognize no division in their allegiance to the Federal or their respective State Governments. All right thinking citizens desire that the law shall take its course in an orderly, regular and uniform manner and that each Governmental Department be confined to its proper sphere. Therefore, the main question, an answer to which is sought in these proceedings is:

> Has a Circuit Court of the United States jurisdiction to entertain a suit to enjoin a State from bringing orderly and appropriate judicial proceedings to compel a corporation subject to its laws to obey them?

While we shall be compelled to press upon the attention of the Court other questions, we will do so still with hope that upon the answer to the above question will depend the decision in this proceeding with the result not only of restoring industrial peace in Minnesota and elsewhere, but also what is more important, removing all possible chance of conflict between courts of different jurisdictions in suits hereafter brought of the character of that instituted in the Circuit Court.

In support of our contention that Mr. Attorney General Young is, by the order of the Circuit Court punishing him for contempt, now unlawfully restrained of his liberty and that this Court will by writ of *habeas corpus*, order his discharge from custody, we respectfully submit the following:

I.

THIS COURT IN THIS PROCEEDING WILL DETERMINE THE JURISDICTION OF THE CIRCUIT COURT IN THE SUIT IN WHICH THE ORDER PUNISHING FOR CONTEMPT WAS MADE, AND IF IT IS FOUND THAT THE CIRCUIT COURT HAD NO JURISDICTION IN THE SUIT, OR WAS WITHOUT POWER OR AUTHORITY TO MAKE THE ORDER ENJOINING THE PETITIONER, WILL DIRECT HIS DISCHARGE FROM CUSTODY.

This claim requires no elaboration on our part. The jurisdiction, power and authority of the Circuit Court will be inquired into, but nothing else. This application does not fall within those decisions where this Court has held that the case was not a proper one to be considered in proceedings under the writ of *habeas corpus* or those holding that this Court may exercise its discretion in granting or withholding the writ. It is in ac-

cordance with the decision rendered in *ex parte* Yarbrough, 110 U. S. 651, in which Mr. Justice Miller said:

> "* * * * It is equally well settled that when a prisoner is held under sentence of any Court of the United States in regard to a matter wholly beyond or without the jurisdiction of that Court, it is not only within the authority of the Supreme Court but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which said Court had no jurisdiction, to discharge the prisoner from confinement."

See also:

Ex parte Fisk, 113 U. S., 713.
Ex parte Wells, 18 How., 307.
Ex parte Lange, 18 Wall., 163.
Ex parte Rowland, 104 U. S., 604.
Ex parte Parks, 93 U. S., 18.
Ex parte Ayers, 123 U. S., 443.
Ex parte Siebold, 100 U. S., 371.
Ex parte Kearney, 7 Wheat., 38.
Ex parte Royall, 117 U. S. 241.
Ex parte Mayfield, 141 U. S., 107.
Ex parte McKenzie, 180 U. S., 536.
Delgado v. Chaves, 140 U. S., 586.
Ex parte Watkins, 3 Peters, 193.

II.

THE SUIT IN THE CIRCUIT COURT WAS NOT WITHIN THE JURISDICTION OF THAT COURT BECAUSE OF DIVERSE CITIZENSHIP.

For the purpose of determining the citizenship of the parties to the suit in the Circuit Court, they will, under the rule of this Court, be arranged as follows:

Those named as complainants in the bill and the

Northern Pacific Railway Company of which they are stockholders, must be considered parties complainant. The suit then was one between a citizen of Iowa, a citizen of Minnesota and a citizen of Wisconsin, as complainants, against citizens of Minnesota, as defendants.

It cannot be claimed, therefore, that the Circuit Court had jurisdiction because of the citizenship of the parties.

Removal Cases, 100 U. S. 457.

Walden v. Skinner, 101 U. S., 577.

Pacific R. R. Co. v. Ketchum, 101 U. S., 289.

Harter v. Kernocham, 103 U. S., 562.

III.

NO FEDERAL QUESTION WAS PRESENTED BY THE BILL OF COMPLAINT WHICH JUSTIFIED THE CIRCUIT COURT IN ASSUMING JURISDICTION.

If the amount in controversy is sufficient, Circuit Courts of the United States have jurisdiction of all suits of a civil nature "arising under the constitution or laws of the United States."

Did the suit, we are considering arise "under the constitution or laws of the United States?"

There is of course no claim that the contention of the complainants in that case, that the rates prescribed were so low that their enforcement would amount to taking property without due process of law would not be sufficient to give this Court the right to review the final determination of the highest Court of a State in which such action was pending. Such allegation might create a contention upon a question of fact; but not a controversy arising under the constitution or laws of the United States.

It must be apparent that if each of the limitations upon the power of the States, and each of the guaranties for the protection of individual rights, embodied in the Constitution of the United States, may be invoked in an affirmative and original suit in the Circuit Court of the United States, not for the purpose of preventing wrong or trespass or the invasion of private rights, but to suspend the operation of a State law until the disputed question of fact be finally determined, the Circuit Courts of the United States will, in the near future, be burdened with litigation of a character which has heretofore been considered entirely outside of and beyond their jurisdiction.

We will have occasion to show hereafter that the only question presented in the suit which could be considered by the Circuit Court was the sufficiency of the rates prescribed by Chapter 232, for the carriage between stations in Minnesota of the commodities named in that law. This did not present a question involving the construction of the Constitution of the United States. The questions presented for determination by the bill of complainant in the Circuit Court may be stated as follows:

a. The rates prescribed by Chapter 232, although confined to commerce wholly within the State of Minnesota amounted to an interference with and a burden upon Interstate Commerce. In answer to this, we quote the language of Mr. Justice White who in writing the opinion in Atlantic C. L. R. Co. v. North Carolina Corporation Co., 206 U. S. 1:

> "The elementary proposition, that railroads, from the public nature of the business by them carried

> on and the interest which the public have in their operation are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to which end is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

b. The rates required by Chapter 232, Laws of 1907, will not permit earnings sufficient to enable the carrier to pay the cost of the service required, and in addition yield a fair return upon the value of the property invested in the service. This averment of the bill under consideration presents the only real controversy, for as was said by Mr. Chief Justice Wait in the opinion in Stone v. Farmers' Loan & Trust Co., 116 U. S. 324,

> "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

The only question, therefore, which was open to controversy was the question of fact as to the sufficiency of the rates prescribed.

This was the position of the learned judge hearing the application for a temporary injunction, who said in his decision, delivered orally, that it would be "very improper," for him to attempt to hold contrary to the numerous decisions of this Court holding that a State might regulate the rates to be maintained exclusively within its domain, and the injunction restraining any proceedings to enforce the provisions of Chapter 232, was granted solely upon the ground that in his judgment, the showing indicated the insufficiency of the rates, examined in the light of the settled construction of the Fourteenth Amendment.

That the adequacy or inadequacy of a prescribed rate is a question of fact only was the holding of this Court in the opinion written by Mr. Justice McKenna in a very recent case.

Illinois C. R. Co. v. Interstate Commerce Com., 206 U. S. 441.

Where the true meaning and construction of a constitutional provision has been settled by decisions of this Court, the jurisdiction of the Circuit Court will be determined, upon a consideration of the bill of complainant, in the same manner as it would be if it appeared from all the pleadings in the case that there was no controversy as to the meaning or construction of the Constitution or law under which is claimed the controversy arises.

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S., 239.

Equitable Life Assurance Co. v. Brown, 187 U. S., 308.

New Orleans Water Works Co. v. La., 185 U. S., 336.

The averment in the bill of complaint in the Circuit Court that the suit was a

> "suit in equity arising under the Constitution of the United States, * * * for the reason that the said Acts and Orders, and each of them, and all the tariffs, rates, charges, regulations, schedules and classifications therein assumed to be prescribed, and each of them, are violative of the Constitution of the United States,"

will be examined in connection with the other allegations of the bill and if it appears that the construction

of the Constitutional provision relied upon was not in controversy, it will be held that the Court was without jurisdiction.

If the construction of the Constitutional provision has been settled, its effect has been settled. The *construction* to be given to a law, the *meaning* to be given to a law, and the *effect* of the law are the same. Considering for instance the Fourteenth Amendment, its *construction,* with reference to the suit in the Circuit Court, is that it prohibits a State from prescribing or enforcing rates whch are confiscatory. Its *meaning* is that such action upon the part of the State would be to deprive the carrier of its property without due process of law, its *effect* is to render any law of the State fixing confiscatory rates void for repugnancy to the supreme law. Its construction, meaning and effect remain the same in all cases. The validity of the law in question did not depend upon any possible new construction, meaning or effect of the Constitutional provision, but depended entirely upon the adequacy of the rates prescribed. The adequacy or inadequacy of these rates was a question of fact to be determined under the particular conditions involved and not to any extent was there a controversy as to the construction, meaning or effect of the constitutional provision.

The construction and effect of the provisions of the Constitution of the United States relied upon in the suit in the Circuit Court are settled beyond controversy by the following as well as many other decisions:

Munn v. Illinois, 94 U. S., 113.

C. M. & St. P. R. R. v. Minnesota, 134 U. S., 418.

Wisconsin & R. R. v. Jacobson, 179 U. S. 287.

Covington v. Bridge Co., 154 U. S., 204.
Houston Central Ry. Co. v. Mayes, 201 U. S. 321.
Stone v. Farmers' Loan & Trust Co., 116 U. S.
Dow v. Beidleman, 125 U. S., 680.

In the case of Carson v. Durham, 121 U. S. 421, the Court said, at page 427:

"Before considering further this branch of the case, it is proper to notice the difference between the provisions of the Act of 1875, for the removal of suits presenting Federal questions, and those in Section 709 of the Revised Statutes, for the review by this Court of the decisions of the highest Courts of the States. Under the act of 1875, for the purposes of removal, the suit must be one 'arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority,' that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States or sustained by a contrary construction. Starin v. N. Y. 115 U. S. 248, 257, and cases there cited, but under Section 709 there may be a review by this Court of the decisions of the highest Courts of the States in suits 'where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission, held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.' For the purposes of a removal the Constitution or some law or treaty of the United States must be directly involved, while for the purposes of review, it will be enough if the right in question comes from a 'commission held, or an authority exercised under the United States.' Cases, therefore, relating to the jurisdiction of this Court for review are not necessarily controlling in reference to removals."

We cite further:

Tennessee v. Davis, 100 U. S. 257.
New Orleans v. Benjamin, 153 U. S. 411.
McCain v. Des Moines, 174 U. S. 168.
Defiance Water Co. v. City of Defiance, 191 U. S. 184.
Hooker v. Los Angeles, 188 U. S. 314.
Shoshone Ins. Co. v. Rutter, U. S. 177, 505.
Blackburn v. Gold Min. Co., 175 U. S. 571.
Carson v. Durham, 121 U. S. 421.
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282.
Minn. v. Northern Security Co., 194 U. S. 48.
Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239.
Equitable Life Assurance Co. v. Brown, 187 U. S. 308.
New Orleans Water Works Co. v. La., 185 U. S. 336.
New Orleans v. Water Works Co., 142 U. S. 79.
Hamblin v. Western Land Co., 147 U. S. 531.
St. Joseph, etc. Co. v. Steele, 167 U. S. 659.
Wilson v. North Carolina, 169 U. S. 586.

IV.

THE SUIT IN THE CIRCUIT COURT SHOULD BE CONSIDERED AS THOUGH THE ATTORNEY GENERAL WAS THE ONLY DEFENDANT NAMED IN THE BILL.

Of all the defendants named in the bill of complaint in the suit in the Circuit Court, the Attorney General was the only one having any interest to defend. We present this phase of the matter only to show that the propriety

of the suit, as to the Attorney General, is a concrete question not complicated to any extent by the fact that other defendants were named.

The parties named as defendants in the bill in the Circuit Court may be classified as follows:

1. The Railway Company.
2. Private citizens alleged to be interested shippers.
3. The members of the Railroad and Warehouse Commission.
4. The Attorney General.

The first two classes may be passed without comment. The Railway Commission was joined solely because of its having made an order relating to merchandise rates which, though it had been adopted and put into effect by the Railway Company several months before, was assailed as unreasonable in the bill. But no injunction was issued against anybody on account of said order, and therefore, neither the merchandise rate order nor the Railway Commission are before the Court in the proceedings now pending.

The Railway Commission had no connection with the passenger rate law, or the commodity rate law, and no relief was asked against it as to either of said statutes. The passenger rate law had gone into effect before the suit was commenced, the commodity rate law had not gone into effect. The injunction granted, only prohibited the enforcement of the *commodity rate law*, and so far as it applies to the Attorney General is as follows:

> "That you, Edward T. Young, as *Attorney General of said State of Minnesota*, are, pending the final hearing of this cause, and until the further order of the Court in the premises, restrained and enjoined from taking or instituting any action, suit,

> step or proceeding to enforce the penalties and remedies specified in said Act, or either thereof, or to compel obedience to said Act or compliance therewith, or any part thereof."

The suit in the Circuit Court, therefore, must be regarded as one solely against the Attorney General in his official capacity to enjoin him from bringing appropriate legal proceedings by and in the name of the State to compel a corporation to obey the laws of the State.

We submit that no such suit can be maintained in any jurisdiction.

V.

THE CIRCUIT COURT EXCEEDED ITS POWER AND AUTHORITY IN MAKING ITS ORDER THAT THE PETITIONER BE ENJOINED AS ATTORNEY GENERAL FROM TAKING APPROPRIATE LEGAL PROCEEDINGS TO COMPEL THE RAILWAY COMPANIES TO COMPLY WITH THE ACT OF APRIL 18TH, 1907.

In Rhode Island v. Mass. 12 Peters, 718, this Court defined jurisdiction as follows:

> "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them."

In Ex parte Fiske, 113 U. S. 713, it was said, page 728:

> "The Circuit Court was, therefore, without authority to make the orders for the examination of the petitioner in this case, and equally without authority to enforce these orders by process for contempt."

In that case, the Court had complete jurisdiction of the subject matter and of the parties. The order made, however, was beyond its authority.

Had the Eleventh Amendment never been adopted, this suit against the Attorney General could not be maintained, and had he in the first instance fully submitted himself to the jurisdiction of the Circuit Court, any order attempting to control the exercise of the executive discretion vested in him, would be beyond the power and authority of the Court.

It should not be assumed under the authority of Chisholm v. Georgia, that in the absence of the Eleventh Amendment, a State would be subject to all suits. In that case, it was claimed that the State was indebted to the complainant upon a money demand. The political or governmental powers of the State were in no way involved. Mr. Chief Justice Jay said in his opinion, page 479:

> "For the reasons before given, I am clearly of opinion, that a state is suable by citizens of another State, but least I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, viz: That such suability may, nevertheless, not extend to all the demands and to every kind of action. There may be exceptions."

However, be this as it may, the decision in the Chisholm case was based upon the positive language of the Constitution. The Eleventh Amendment restored not only immunity to the States from suit, but secured the same immunity to each department of a State which under the Constitution thereof was made independent of the judicial power.

Status of Attorney General.

Section 1 of Article 3 of the Constitution of Minnesota is:

> "The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in instances expressly provided."

And Section 1 of Article 5 is:

> "The executive department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, and *Attorney General,* who shall be chosen by the electors of the State."

The Statutes of Minnesota add but little to the powers possessed by the Attorney General under these provisions of the fundamental law. As was said by the Supreme Court of Minnesota in a very recent case,

State v. Robinson, 101 Minn. 277:

> "The office of Attorney General has existed from an early period both in England and in this country and is vested by the common law with a great variety of duties in the administration of the Government. * * * From this it follows that as the chief law officer of a State he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. We have no statutory restrictions in this state. The statute under consideration reposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude the general authority of the Attorney General upon the same subject. We have numerous instances where particular duties are ex-

> pressly imposed upon the county attorney, yet it is clear that the Attorney General has the right, in virtue of his office, to co-operate with or act independently of that official in all cases where the public interests justify it."

It is true, there are several legislative enactments directing the performance of certain duties by him, but in no case, so far as is material here, do they add to his duties as understood at common law nor do they, in any case in point, impose a ministerial duty upon him.

Revised Laws 1905, Sec. 59, 62.

Chap. 227, *Laws* 1905.

Revised Laws of 1905, Sec. 1960.

In the oral decision rendered upon the motion to dismiss the bill as to the Attorney General, the learned Trial Judge said:

> "There is no other practical way to raise the question than by bringing a suit of this kind and making the Attorney General a party to it. There would be no purpose in going on with these actions if the Attorney General is left out. He is the person who is alleged in the bills, has threatened and is threatening to enforce these alleged unconstitutional rates and if not enjoined of course he will be entirely free to proceed to enforce them. The one Statute of the State which requires him in such a case to so proceed is Section 395 of the Statutes of Minnesota, and by that he is required in case he shall have evidence that a railway company has committed any offense against the laws of the State, or abandoned them, to commence a prosecution against the railroad company at once. It is not a matter that is left to his discretion as to whether he shall proceed or not. The Statute requires him to do so."

We assume that the number of the section as given in the above quotation was erroneous and that the section

referred to was Section 58, Revised Laws 1905, which is as follows:

> "He shall cause to be prosecuted all assessors and other officials for such delinquencies in connection with the revenue laws as may come to his knowledge; also all bonds of officers and others upon which any liability to the State has accrued. Whenever any corporation shall have offended against the laws of the State or misused, surrendered, abandoned or forfeited its corporate authority, or any of its franchises or privileges, he shall cause proceedings to be istituted against it."

This Statute does not deprive the Attorney General of the discretion vested in him. It still remains for him to determine when, within the meaning of that section "a corporation" has "offended against the laws" or when or how it has "misused, surrendered, abandoned, or forfeited its corporate authority."

The authority of the Attorney General to prosecute or defend a suit in which the State is concerned is necessarily implied from the nature of his office and he may bring an action where the wrong or injury complained of affects the public.

4 *Cyc.* 1028-1031.

Hunt v. Ry. Co., 121 Ill. 638.

Orton v. State, 12 Wis. 567.

Atty. Genl. v. Williams, 174 Mass. 476; 47 L. R. A. 314.

People v. Oakland, 118 Cal. 234.

Atty. Genl. v. Detroit, 26 Mich. 262.

The Attorney General of Minnesota is, therefore, an executive officer of the State second to none in the character and importance of his duties. No suit can be brought by the State, except by him. No defense can be

made by the State, except by him. With minor exceptions, such as the institution of criminal actions at the request of the Governor, *his discretion in the prosecution and management of actions to which the State is a party is absolutely uncontrolled. There is nothing of a ministerial character about his duties, in so far as they relate to litigation conducted by him in the name of the State.* The name and power of the State, so far as their use in litigation is concerned, are confined to his discretion, subject to control by no other officer, except in certain cases not material here.

State v. Tracy, 48 Minn. 497.

Under the Statutes of Minnesota the Attorney General is not required to institute criminal proceedings except on the request of the Governor. Criminal proceedings are in the first instance instituted by the attorneys for the various counties, who have the right, however, to call on the Attorney General for assistance. But when any criminal case reaches the Supreme Court of the State, it comes into the exclusive charge of the Attorney General. Therefore the injunction issued in the Circuit Court interferes with the administration of the criminal laws of the State. Such interference is beyond the power of a Court of Equity, except where the criminal case is instituted by a party to a suit already pending before it as of which it has jurisdiction to try the same question therein involved.

In re Sawyer, 124 U. S. 200.

The doctrine of which case is universally accepted.

VI.

THE SUIT IN WHICH THE INJUNCTION WAS ISSUED COULD NOT HAVE BEEN MAINTAINED IN THE COURTS OF MINNESOTA.

In the case of Reagan v. Farmers' Loan & Trust Company, 154 U. S., at page 391, it was said:

> "* * * Given a case where a suit can be maintained in the Courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts."

If the right of the complainants in the suit in the Circuit Court to maintain it depends in any degree upon their right to maintain a similar action in the State Courts of Minnesota, there is no difficulty in arriving at the answer. The Minnesota Courts could not entertain such an action against the Attorney General.

A most satisfactory case in this connection is:

St. Paul and Chicago Ry. Co. v. Brown, 24 Minn. 517.

Briefly the case was this: The rights of the plaintiff Railway Company and the State of Minnesota to certain lands patented to the State by the Federal Government were in dispute, the Railway Company claiming under a certain grant and the State insisting upon retaining the lands for the benefit of certain charitable institutions.

The Legislature of Minnesota, by a joint resolution, authorized an action to be brought to determine the respective rights of the parties, the resolution authorizing the Trustees of the charitable institutions to institute

or defend all such actions and provided that the judgment should be binding upon the State. The Railway Company commenced an action against the Governor of the State and the Trustees of the various hospitals and institutions. Demurrers were interposed by the defendants and were sustained in the lower Court and appeals were taken.

The opinion written in deciding the appeal was from the pen of the late Chief Justice Gilfillan, a truly great jurist, who was noted for his clear and sound judgment and terse form of expression. He said, page 573:

> "The demurrer upon the part of the Governor was properly sustained, on the ground that the Court has no jurisdiction over him. The duties of the Governor sought to be enforced in this action are duties belonging to him as executive of the State and not as an individual. Rice v. Austin, 19 Minn. 103. He is not subject to the control of the judiciary in the performance of such duties, and no action or proceeding before any Court will lie against him to compel such performance. Nor can the joint resolution of the legislature, referred to in the complaint, bring him under such control. The independence of each of these departments of the government —the executive, legislative and judicial— rests upon the Constitution, Article 3, and cannot be affected by any legislative act, although it may be approved by the Governor at the time it passes.
>
> The same ground of demurrer taken by the trustees is not well founded. The exemption from control by the judiciary, on the part of the Governor, does not extend to mere administrative agents, who are created and their powers and duties defined by the legislature. The Courts may entertain suits against them as against any merely ministerial officers.
>
> The subject-matter of the action is property belonging to the State and the action, though nominally against the trustees, is virtually against the

State, to determine its right in the property involved. The exemption of the State from actions by its citizens is not based on any constitutional provision, but merely on grounds of public policy. A waiver of such exemption does not trench upon the independence of any department of the Government. There can be no doubt that the Legislature may waive such exemption nor that its consent to do so may be expressed by joint resolution, passed in the manner prescribed by the Constitution, as effectually as in the more formal mode by bill. It is to matters of this character that Section 12, Article 4, of the Constitution relates. The joint resolution of 1873, is an answer to the objection that the action is virtually against the State."

We give this lengthy quotation for the reason that the language of the Chief Justice coincides so fully with our understanding of the decisions of this Court, rendered as well since as before the writing of the above opinion by him, not only on this particular question to which we are now addressing ourselves, but to the other and greater question, to which this discussion inevitably leads, i. e., was the suit against the Attorney General a suit against the State?

The freedom of the Governor of Minnesota from control by the Judiciary of that State is shared by each officer named in the Constitution in whom executive power is vested. For many years, it was held that the rule went to the extent of preventing any interference by the judiciary with even a ministerial duty imposed upon any such officer *co nomine*.

Rice v. Austin, 19 Minn. 103, Gil. 74.
State v. Dike, 20 Minn. 363, Gil. 314.
Secumb v. Kettleson, 29 Minn. 555.
Western R. R. v. De Graff, 27 Minn. 1.

State v. Whitcomb, 28 Minn. 50.
State v. Braden, 40 Minn. 174.
State v. Kent, 96 Minn. 255

It is believed, however, that some later decisions of the Court indicate that where a duty, purely ministerial, is cast upon such an officer as the Auditor or Secretary of State, whose duties are necessarily so diversified, the Court has power to review their action.

State ex rel v. Crosby, 92 Minn. 176.
State ex rel v. Dunn, 86 Minn. 303.
Minnesota Sugar Co. v. Iverson, 91 Minn. 30.

But this modification of the rule can never extend to the Attorney General as such, whose duties must always be discretionary.

State v. Kent, 96 Minn. 255.

It was held in an early case in Minnesota in which the opinion was written by the late Hon. George B. Young while an Associate Justice of the Supreme Court of that State that the executive officer could not surrender this defense.

> "Which, not for his, but for the public good, the Constitution has placed around his office."
> *State v. Dike*, 20 Minn. 363 (Gil. 314).

This Court has never held, so far as we know, that the judiciary may not control an officer of the United States upon whom a duty purely ministerial is imposed, but so far as the political power of the Federal Government is concerned or the discretion reposed in an officer of the executive department, the decisions are entirely in harmony with those of the State Courts.

Mississippi v. Johnson, 4 Wall. 475.
Kendall v. United States, 12 Peters 524.

That the Federal Courts are bound by the principle that the Judiciary will not interfere with the exercise of the political power of the respective states is clearly established by the decision of this Court in

McChord v. L. & N. R. Co., 183 U. S. 483.

In that case, an injunction was sought to restrain the Railroad Commission of Kentucky from *making* an order and was denied as being an attempt to interfere with legislative action.

In Louisiana v. Jumel, 107 U. S. 711, it was said:

> "The remedy sought in order to be complete, would require the Court to assume all the executive authority of the State. * * * It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."

It is apparent that the judicial system of this country, the Federal as well as those of the respective States, should be treated as one harmonious whole, each acting in its own sphere, but of the same origin and based upon the same principles of jurisprudence.

It would not be claimed, if Congress prescribed a certain rate for interstate commerce, that the Attorney General of the United States could be enjoined from bringing proceedings in an appropriate court to compel obedience to the law. Are the duties, privileges and powers of an Attorney General of a State less dignified or important in a legal sense than those of the Attorney General of the United States?

The division of the powers of Government into three departments becomes a farce, if the independence of each is not maintained and we believe that independence

will remain intact, each in its own domain possessing all the power, authority and discretion of the State while this remains "a Government of law and not a Government of men."

The enactment of the Legislature becomes the law of the State. The decree of a Court is the decree of the State and the discretion of the Executive the discretion of the State. This brings us to a consideration of the last and as we think the most important question presented by this record.

VII.

THE SUIT IN THE CIRCUIT COURT AGAINST THE ATTORNEY GENERAL WAS IN EFFECT A SUIT AGAINST THE STATE OF MINNESOTA.

Counsel for complainants in the original action in the Court below, contended, and will no doubt contend here, that the immunity of the State from suits is available to the Attorney General or other State officer—when he, instead of the State, is named as defendant in the record—only when the State, as such, has a pecuniary interest in the action. This contention is not based on the language of the Eleventh Amendment, or the abstract principles of law, but on language used by this Court in the Reagan Case, 154 U. S. 362, and in Missouri K. & T. R. Co. v. Hickman, 183 U. S. 53. The latter case is expressly based on the authority of the former. Each involved the status of a Railway Commission claiming the immunities of their respective states, and in each the Court declared that the Commission did not represent the State, because as an individual the State was not pecuniarily interested; that

the only persons so interested were the shippers and the carriers, and that its governmental interest in the enforcement of its laws was not the interest which under the language used in the Ayers case made the State "the real party against which the decree effectively operates."

This question was not necessary to the decision, either in the Reagan or Hickman Cases, and what is said on the subject in either case might be regarded as obiter.

In the Reagan Case, suit was brought against the Railway Commission of Texas to prevent the enforcement of one of its orders alleged to be, and in the trial found to be, void. Section six of the law involved, expressly permitted the bringing of the suit against the Railway Commission, and Section nineteen of the same statute made it the *specific duty of the Attorney General* to institute suits for the recovery of penalties arising from the failure of Railroad Companies to comply with the Orders of the Commission. The Court, by the consent of the State, had unquestioned jurisdiction over the action against the Commission to try the validity of the order, and as ancillary to that jurisdiction, to protect its decree, it had the right to restrain the Attorney General from performing a ministerial duty by bringing penalty suits as required by the statute in the State Courts, until the validity of the Order was determined; and when the order was found void it had undoubted power to make the injunction against the Attorney General permanent. Mr. Justice Brewer in the opinion refers to the consent given by the State as a ground of jurisdiction and this feature is emphasized

by Mr. Chief Justice Fuller speaking for the Court, in Barney v. City of New York, 193 U. S. 430, where the Reagan case is thus distinguished.

The injunction against the Attorney General in the Reagan Case to prevent the institution of proceedings in the State courts growing out of the order, the validity of which was involved in the action in the Federal Court, is similar to the preventive ancillary remedy afforded in Prout v. Star, 188 U. S. 537 and Gunter v. A. C. L. R. Co., 200 U. S. 273, elsewhere referred to.

The Hickman Case was one where the Railway Commission of Missouri was proceeding in its own name to enforce one of its orders. In an application to remove to the Circuit Court, the claim was made that it was in effect a suit *by the State* and not removable. This Court, in giving its reasons why the Railway Commission thus suing should not be regarded as representing the State, repeated what was said in the Reagan Case as to the lack of pecuniary interest in the State, as a reason for refusing to apply the State's immunity, although the same result in that case could have been reached by the application of the well established rule in this Court as to the suability of such a board.

It could not have been intended by the decision in the Hickman Case to modify in any manner the rule laid down in the leading case of Fitts v. McGee, because in the case of Cotting v. Godard, 183 U. S. 79, decided a few days later, the Court dismissed the action as to the Attorney General, in spite of the lack of pecuniary interest in the State.

The immunity of the sovereign from suit is inherent in all free governments; it reaches to the substance and not to the form of the judicial proceeding. The sovereign may be petitioned, but not sued.

In Osborn v. Bank, 9 Wheat, Mr. Chief Justice Marshall declared that the exemption of a State from suit arises only when it is a party to the record. But that eminent jurist corrected the error of that holding, and expressed the true principle in the case of Governor of Georgia v. Madrazo, 1 Pet. 110 (124), when speaking for the Court, he declared that where the chief magistrate of a State is sued *by his style of office,* and the claim made upon him is *entirely in his official capacity,* the State itself may be considered a party to the record and the exemption applies, concluding with these significant words:

> "If the State is not a party there is no party against whom a decree can be made. *No person in his natural capacity is brought before the Court as defendant.*"

The Ayers Case which is regarded as a modification of Osborn v. Bank, only amplifies the rule announced in the Madrazo Case, and declared that in this class of cases as in others, the Court will not be limited entirely by the names of the parties of record in determining who is the real party in interest in an action. The Court there further held that the immunity of a State from suit will be upheld and extended to its officers in a case where it is the real party in interest—though the suit is nominally against its officers—as well as in the cases where it is named as a party. Nothing is said in either the Madrazo or Ayers cases about the

necessity for pecuniary interest in the State, in order to secure the immunity of its officers when sued officially.

In United States v. Beebe, 127 U. S. 338, Mr. Justice Lamar, speaking for the Court in reference to this rule, said:

> "It has not been unusual for this Court for the purposes of justice to determine the real parties to a suit, by reference not merely to the names in which it is brought, but to the facts of the case, as they appear on the record. Thus in the case decided at this term—Re Ayers, 123 U. S. 492—the Court held that the State of Virginia, though not named as a party defendant, was the *actual party in the controversy.* So in the cases of New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S. 76, the Court looked behind and through the nominal parties on the record, to ascertain who were the real parties to the suit."

In the two cases last referred to, the suits were brought in the names of the States, but the Court held they were prosecuted on behalf of private parties, and refused to entertain original jurisdiction. The rule is properly applied both ways.

It is clear therefore, that if a lack of pecuniary interest in the State deprives its officers of immunity from suit in cases where they are proceeded against in their official capacity, and where, because it is the power of the State that is sought to be reached and controlled, *the State is the real party in interest,* such lack of pecuniary interest would, in the same case, deprive the State of immunity if it were actually named as a party of record. If immunity depends upon pecuniary interest in the one case it must in the other.

There are not different kinds or grades of immunity

to be applied in different classes of cases. The immunity in all cases is a matter of substance, not of form. It is intended to prevent interference by a Court with the sovereign power of the State, and it would seem that when such sovereign power is sought to be interfered with, the right to the immunity arises to prevent it, whatever may be the form, or whoever may be the parties of record in the action.

The cases in which the State as such, has a pecuniary interest, outside of actions for the collection of its revenues, are necessarily very few. The State exists for the protection of the public interests and the enforcement of public rights, and not for pecuniary profit. It cannot be an intermeddler in private controversies, but when in its governmental capacity in performing its public duties, it seeks the aid of its own courts in judicial proceedings, it needs no pecuniary interest to uphold its action.

In Savings Bank v. United States, 86 U. S. 227, this Court declared that the royal prerogative of the King in his capacity of *parens patriæ* or universal trustee, under the English common law, belongs, under our system, to the State, and that the principle is as much a part of our law as of the British Constitution. The exercise of such power has often been upheld by this Court.

In United States v. American Bell Telephone Co., 128 U. S. 315—which was an action to cancel a patent fraudulently obtained, where the right of the government to bring the action was challenged—the Court said:

> "The essence of the right of the United States to interfere in the present case is its obligation to pro-

> tect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States."

In the case of the United States v. the same defendant, in 159 U. S. 548, involving the validity of another of the company's patents, Mr. Chief Justice Fuller speaking for the Court, said:

> "In instituting this suit, the government appeared on behalf of the public, and as it were, in the exercise of the beneficent function of superintending authority over the public interests, and the rule of construction in such cases is properly regarded as affected by considerations of public policy. It is upon the principle of public policy that the United States have been held not bound by statutes of limitations unless Congress has clearly manifested that they should be bound, * * * and the same rule is applicable to the exercise of *parens patria*, inherent in the supreme power of every State."

An elaborate and illuminating discussion of the question is contained in the case entitled "Re Debs," 158 U. S. 564, where Mr. Justice Brewer, speaking for the Court, says:

> "Every government entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance for the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. * * *
>
> It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet whenever the

> wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

In United States v. Telephone Co., 167 U. S. 224, an action to cancel a patent, the Court says:

> "Suits may be maintained by the government in its own courts to set aside one of its patents, not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual."

If therefore the states are entrusted with powers and duties, to be exercised for the general welfare, over domestic railroad rates, they need have no pecuniary interest in order to justify action by either the legislature or the courts, to promote the exercise of those powers or the discharge of those duties.

The national power over interstate and foreign commerce arises from the express grant of the Constitution, while the power of the states over their domestic commerce does not come from any grant of authority, but arises out of the police power, which was not surrendered by the States when the National Constitution was framed. The right of the States under the police power, to regulate domestic commerce has been upheld by this Court in the Granger Cases, and by an unbroken line of decisions. Mr. Justice White in A. C. L. R. Co. v.

N. C. Corp. Com., *supra,* decided a few months ago, tersely said that this power was too well established to be subject to question. The power of regulation must include the power to *enforce* as well as to *prescribe,* rates.

The police power is not exhausted when the legislature has acted by prescribing the regulation. The executive and judicial departments of the State must have the power to make the regulation effective by enforcement. The efficiency of the State government would be destroyed if the State, through its executive officers, could not enlist the aid of its Courts to enforce the laws which it has the power to make, in the enforcement of which the public have an interest, but in which the State as such, has no pecuniary interest. It is too narrow a view of the question of railroad rates to say that no one is pecuniarily interested except the shipper and the carrier. Railroad rates are paid to the common carriers by the shippers or receivers, but the burden of the rates falls on the entire community consisting of the producers and the consumers. The farmer sells his products for the price at the trade center less freight. The merchant adds all sums paid for freight to the cost of his goods, and collects it back from the consumer.

It would be entirely accurate, therefore, to say that there is no one who is not pecuniarily interested in the charges of our common carriers, because there is nobody who does not pay a portion of the general cost of transportation. The people at large who bear the burden have no contractual relations with the carriers, and are wholly without means to protect themselves from extortionate rates. It is for this reason that the public

duty devolves upon the State of prescribing and enforcing reasonable rates.

To prescribe rates would do the public no good if they were not enforced—and they cannot be enforced unless the State may, either in its own name or in the name of some appropriate officer to whom it may delegate the necessary power, apply to the Courts for their assistance. Ordinarily laws provide civil penalties or criminal punishments for disobedience, but it would be entirely permissible to enact a law providing no penalty, and in such case, if the law pertains to a subject within the public duties of the State, it may, in its sovereign capacity, ask its own Courts by mandatory writ to enforce the law.

To say that the State must have a pecuniary interest, in order to secure exemption, when its powers are interfered with in a suit against its officers, when in other words, *it is the real party in interest*, though not named in the record—but that no pecuniary interest is necessary when *it is the real party in interest* and is named in the record, does not seem sound. This Court has often upheld suits instituted by the United States solely in the interests of the public welfare, prohibiting disobedience to a law without reference to pecuniary interest, and there is no reason why for the same purpose a Court may not enter a decree commanding obedience to a law.

The immunity of a State from suit was not created by the Eleventh Amendment, though we are in the habit of referring to it as the foundation of the right; it existed before the Constitution was framed under the principles of the common law. The immunity is an attribute of sovereignty. It was intended to leave un-

fettered the exercise of the great powers for which the State was created.

That part of the Constitution defining the judicial power of the United States was held in Chisholm v. Georgia, to have granted away the immunity and the dissatisfaction with which the decision was received, was not founded on error in the decision, but upon surprise at the inadvertence in the use of language by the framers of the Constitution that accomplished a result not intended by the people. The Eleventh Amendment therefore, instead of assuming to create a new right in the States forbade a construction of the clause defining the judicial power of the United States, which would take away the pre-existing right to immunity.

Hans v. Louisiana, 134 U. S. 1.

The purpose of this common law immunity was thus well stated in the Ayers case:

> "* * * To prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent and in favor of individual interests."

This language was repeated with approval in the leading case of Fitts v. McGee, 172 U. S. 516, which has since been uniformly adhered to.

The State of Minnesota clearly owes a public duty to

its people to enforce the commodity rate law involved in the main case, both by civil and criminal proceedings. Its Attorney General is its only law officer. The State cannot be sued or restrained so as to deprive it of the power to perform that duty, either by naming it as defendant and prohibiting its action or by naming its Attorney General as defendant and restraining him, its sole law officer, from acting for it in the commencement of civil or criminal actions under the law.

In addition, we desire to direct attention to the fact that this inquiry as to whether or not the State had a pecuniary interest has been limited to those actions in which an administrative officer was the party named or where the action was to enjoin the performance of a purely ministerial duty by an executive officer.

The argument that the State has no pecuniary interest in the enforcement of laws enacted by it for the safety and well-being of the people of the State has never been accepted by this Court to support the claim that the State might be sued *co nomine* or that an action nominally against an executive officer of a State to restrain the exercise of his discretion, where he was neither committing or threatening to commit a wrong or trespass, was not in effect a suit against the State.

Where the decree of the Court can operate only upon the State and only to restrain the action of the State, the suit, no matter against whom it is brought, is in effect one against the State and in such case the pecuniary interest the State may or may not have in the result of the litigation is immaterial.

Had the adoption of the Fourteenth Amendment the effect of repealing pro tanto the Eleventh Amendment?

That the suit in the Circuit Court was in effect one against the State was fully argued upon the motion to dismiss the bill as to the Attorney General and again upon the hearing of the order to show cause. It is evident that the learned Jurist presiding had no doubt that the suit was in effect one against the State of Minnesota and frankly expressed his opinion that it was his duty to restrain the State. This clearly appears from his language in denying the motion to dismiss, and later in granting the order for a temporary injunction. Upon the latter occasion, he said:

> "These bills of complaint are met by demurrers upon various grounds, one of which is that, being brought against the Attorney General and other State officers, but especially the Attorney General, they, in fact, amount to actions brought against the State, which are prohibited so far as the Federal courts are concerned, by the Eleventh Amendment to the Constitution of the United States. This matter I disposed of at a preliminary hearing contrary to that contention, holding that *although the State is interested in this matter*, these suits are not in terms nor in necessary effect, actions against the State. No property of the State is affected; no revenues of the State are affected by the result of the litigation. And although the eleventh amendment to the Constitution prohibits suits, or actions, against the State, by citizens of another state or of a foreign country, the fourteenth amendment provides that the State shall not deprive any person of life, liberty, or property without due process of law. There must be some way to enforce that provision of the Constitution. It is a provision which requires no action of Congress to make it effective. *It is a prohibition against the State.* And if the State by any act attempts to deprive any one of

life, liberty, or property without due process of law, *the courts must provide some adequate remedy* for the protection of such person. It would be a reproach to the Courts did they fail to provide an adequate remedy in a case of that sort. And it is unnecessary in these cases to hold that the eleventh amendment would be ineffective as against the later provision, in the fourteenth amendment, if the remedy can be reached in another way; and it seems to me that it can—*by tying the hands of the officers of the State*, if necessary, in a proper action, and restraining them from attempting to enforce or put in effect a provision of the law of the State which is unconstitutional under the terms of the fourteenth amendment. This has been done in so many cases that it seems to me it does not now require argument to sustain that position. And I, therefore, hold that that ground of the demurrer is not well taken." (The italics are ours.)

In saying that the Fourteenth Amendment is "a prohibition against the State," the provisions of which "there must be some way to enforce" and again, "and if the State by any act attempts to deprive any one of life, liberty or property without due process of law, the Courts must provide some adequate remedy for the protection of such person." His Honor, Judge Lochren, very plainly expressed his determination to restrain the State, and he further said that this remedy could be afforded "by tying the hands of the officers of the State."

Thus he ignored the following explicit language of this Court in the Fitts case—

> "* * * Under the view we take of the question the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that

> the statute is unconstitutional and void. And that question can be ultimately brought to this Court for final determination."

The learned Trial Judge seems to have been impressed with the conviction that the duty of upholding the Federal Constitution rests solely and primarily upon the Federal Courts, whose especial duty it is to first determine the validity of a State enactment, and that the limitations on the power of the States contained in the Fourteenth Amendment would be unavailing unless the inferior Federal Courts could restrain the enforcement of State laws whenever it was claimed by private persons that they violated such limitations. This amounted to saying that the Fourteenth Amendment nullified the Eleventh. The claim is untenable that the non-sueability of the State is inconsistent with the undoubted Federal power to declare void any State law, the enactment of which is prohibited by the Federal Constitution.

There were many limitations on the power of the States contained in the original Constitution. It was there provided that no State should enter into any treaty, alliance or confederation; grant letters of marque or reprisal; coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. Could it be claimed that by reason of the adoption of the Eleventh Amendment these limitations ceased to be the supreme law of the land?

Is it not perfectly clear that the people intended to make those negative federal guaranties available, by the power with which this Court is clothed to review the

decisions of the highest Court of the State when rights claimed under the Federal Constitution or laws are involved, and the decision of the State Court is against such claim. If the people did not intend by the Eleventh Amendment to abolish all existing Federal limitations, but on the contrary did intend that those limitations on the power of the State, and its non-sueability should coexist, how can it be claimed that the equilibrium between the two governments was overthrown by the adoption of the Fourteenth Amendment, which, so far as is here material, simply added some additional limitations on State power of the same general character as those contained in the original Constitution.

The true theory of the relations between the States and the Federal government, requires that the question of the validity of State laws, which are claimed to be contrary to the limitations on State power contained in the Federal Constitution, should, in the nature of things, first be passed upon by the courts of the State, especially if they are police laws which the State in its sovereign capacity must enforce. Individuals are adequately protected as to such laws by the right which this Court has to review the decisions of the highest Court of the State. Only by this practice can there be any uniformity in the rule of decisions upon such questions, and the States be protected from unwarranted interference in their public administration. As was said by this Court in Shoshone Mining Co. v. Rutter, 177 U. S. 505-506:

> "It" (Congress) "has so constructed the judicial system of the United States, that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several states."

The fundamental right of the States was well recognized in Ex Parte Kemmler, 136 U. S. 436, where the Court said:

> "The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other and of both governments to the people. * * * *Protection to life, liberty and property rests primarily with the States*, and the Amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure."

Indeed, it is peculiarly appropriate that the Supreme Court of the State in which a Legislative enactment is effective should first pass upon it, as the construction placed upon it by that Court is conclusive.

> *Chicago, Milwaukee, C. M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418.

We are far from claiming that in a suit of which it has jurisdiction a Circuit Court may not construe a state law or determine its validity, but there is no support for the claim that the Circuit Courts of the United States "must provide some adequate remedy," or in other words, must assume jurisdiction in equity of an action brought to test the validity of a State law when such action on its part involves the elimination of the Eleventh Amendment.

In *Robb v. Connolly*, 111 U. S. 624,

it was said:

> "Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the State are excluded altogether from the consideration and determination of questions in-

volving an authority, or a right, privilege or immunity derived from the Constitution and laws of the United States. But this view is not sustained by the statute defining and regulating the jurisdiction of the Courts of the United States. * * * A State Court of original jurisdiction having the parties before it may consistently with existing Federal legislation determine cases at law or in equity arising under the Constitution or Laws of the United States or involving rights dependent upon such constitution or laws. Upon the State Courts equally with the Courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the Judges of the State Courts are required to take an oath to support that Constitution and they are bound by it, and the laws of the United States made in pursuance thereof and all treaties made under their authority as the supreme law of the land 'anything in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest Court of the State in which the question could be decided to this Court for final and conclusive determination."

In City of New Orleans v. Benjamin, 153 U. S. 411, it was said:

"The Judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases, it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution and it is readily seen that cases in that predicament must be rare. Ordinarily, the question of

> the repugnancy of a State statute to the impairment clause of the Constitution is to be passed upon by the State Courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require. (Chicago & A. R. Co. v. Wiggins Ferry Company, 108 U. S. 18) and if there be ground for complaint of their decision, the remedy is by writ of error under Section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the 25th Section of the Judiciary Act of 1789 and has adhered to it in subsequent legislation."

The case referred to in the above quotation (Chicago etc. v. Wiggins Ferry Co.) was one in which it was attempted to remove to the Circuit Court of the United States an action commenced in a State Court. One of the parties to the action pleaded, by way of estoppel, a judgment previously rendered. Upon the claim that the judgment, so pleaded, failed to give full faith and credit to the laws of another State, it was attempted to remove the action to the Federal Court upon the ground that a Federal question was involved. In concluding the opinion which Mr. Chief Justice Waite delivered in that case, he said:

> "The presumption in all cases is that the Courts of the States will do what the Constitution and laws of the United States require and removals cannot be effected to the Courts of the United States because of fear that they will not."

The District Court of Minnesota is a Court of general jurisdiction fully equipped and with full authority to give equitable relief to suitors before it. No possible proceeding, civil or criminal, could be brought by the Attorney General in any of the Courts of that State to

secure compliance with the provisions of Chapter 232 Laws of 1907 in which it would not be open to the defendant proceeded against to interpose in his defense any protection afforded by the Constitution of the United States.

Railway Company v. Gill, 156 U. S. 649.

In making the order granting a preliminary injunction, the Circuit Court ignored the Eleventh Amendment to the end that effect might be given to the Fourteenth Amendment. It is elementary that it is the duty of a Court to give effect to every provision of law if that is possible. This can be done by the procedure indicated in the Fitts case, and that procedure is the one intended by the Constitution as that instrument has been interpreted by Congress and this Court.

VIII.

THE CIRCUIT COURT WAS WITHOUT JURISDICTION UNDER THE DECISION IN FITTS V. McGHEE.

In that case, this Court, through Mr. Justice Harlan, said:

> "What is and what is not a suit against a State has so frequently been the subject of consideration by this Court that nothing of importance remains to be suggested upon either side of that question. It is only necessary to ascertain in each case as it arises, whether it falls on one side or the other of the line marked out by our former decisions."
>
> *Fitts v. McGhee*, 172 U. S. 516.

There is no distinction to be drawn between the suit in the Circuit Court and the Fitts case, and the latter having been placed with the class of cases which are in

truth and effect against the State, notwithstanding the fact that the State is not named as a party, it would seem, "that nothing of importance remains to be suggested."

If statements of the case of Fitts v. McGhee and the suit in the Circuit Court in which the order was made enjoining the Attorney General of Minnesota were placed in parallel columns they would, with the exception of names and dates, be shown to be practically identical. The legislature of Alabama prescribed tolls to be charged for the use of a bridge; the legislature of Minnesota prescribed tolls to be charged for the use of a railway. In Alabama the suit was one to restrain the Attorney General from instituting criminal proceedings to enforce the law and in Minnesota to restrain the Attorney General from instituting either civil or criminal proceedings.

After an exhaustive analysis of previous cases Mr. Justice Harlan further said in Fitts v. McGhee:

> "If these principles be applied in the present case, there is no escape from the conclusion that although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. As a State can act only by its officers, an order restraining those officers from taking any steps by means of judicial proceedings in execution of the statute of February 9, 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession,

by simply asserting that they held or were entitled to hold the property in their capacity as officers of the State. In the case supposed, they would be compelled to make good the State's claim to the property and could not shield themselves against suit because of their official character. Tindal v. Wesley, 167 U. S. 204-222. No such case is before us.

It is to be observed that neither the Attorney General of Alabama nor the solicitor of the Eleventh Judicial Circuit of the State appears to have been charged by law with any special duty in connection with the act of February 9th, 1895."

The case of Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, in which was pointed out the difference in the pecuniary and governmental interest a State may have in litigation, had already been decided. Smyth v. Ames, 169 U. S. 466, had been decided only a few months previously. Those and other cases were pressed upon the attention of the Court in support of the suit against the Attorney General. Replying to that contention he said (p. 529):

"Upon examination, it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit, some specific wrong or trespass, to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State. In the present case, as we have said, neither of the State offi-

cers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former, as the executive of the State, was in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any Court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizens, they may be individually proceeded against for such trespass or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against, under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this Court for final determination."

No matter in what language the argument may be couched, to sustain the suit in Minnesota, it must be shown that Fitts v. McGhee has been or should be overruled.

IX.

THE DOCTRINE OF FITTS V. MCGHEE WAS IN ACCORDANCE WITH THE PREVIOUS DECISIONS OF THIS COURT.

This decision was not a new declaration of the position of this Court upon the question involved. In 1828, Mr. Chief Justice Marshall, delivering the opinion of the Court, said:

> "The claim upon the Governor is as a Governor. He is sued not by his name but by his title. The demand made upon him is not made personally but officially. The decree is pronounced not against the person, but the officer and appears to have been pronounced against the successor of the original defendant, as the appeal bond was executed by a different Governor from him who filed the information. In such a case, where the Chief Magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant."
>
> Governor of Georgia v. Madrazo, 26 U. S. (1 Peters), 110.

In Board of Liquidation v. McComb, 92 U. S. 531, Mr. Justice Bradley, writing, said:

> "The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a Court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper

jurisdiction of the latter. But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal, may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In Pennoyer v. McConnoughy, 140 U. S. 1, Mr. Justice Lamar, delivering the opinion of the Court, said:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provisions which provides 'no State shall pass any law impairing the obligations of contracts.' This immunity of a State from suit is absolute and unqualified and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a State to compel them to do the acts which constitutes a performance by it or its contracts, is, in effect a suit against the State itself.

In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that different views have been presented.

The first class is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Re Ayers*, 123

U. S. 443; *La. v. Jumel*, 107 U. S. 711; *Antoni v. Greenhow*, 107 U. S. 769; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446; *Hagood v. Southern Co.*, 117 U. S. 52. The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the State, or for compensation and damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Finally we have In re Ayers, 123 U. S. 443, wherein Mr. Justice Matthews said:

"These considerations, however, are adverted to in this connection, not so much for the purpose of showing that the substance of the bill presents a case, the subject matter of which is not within the jurisdiction of the Court, as to show that it does not allege any grounds of equitable relief against the individual defendants for any personal wrong committed or threatened by them. It does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties. The relief sought is against the defendants, not in their individual but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia, in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations

it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the Court by process served upon its Governor and Attorney General, according to the precedents in such cases. New Jersey v. New York, 30 U. S. (5 Pet.) 284-290; Ky. v. Dennison, 65 U. S. (24 Howard) 66, 96-97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz: the present defendants, its Attorney General, and the Commonwealth's Attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the Court as proceeding in contempt of its authority and would be liable to punishment therefor by attachment and imprisonment.

The nature of the case as supposed is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the Court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the Court as an actual and real defendant?

* * * * *

The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming, nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United tSates, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be sub-

ject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly and with such breath and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In his concurring opinion in that case, Mr. Justice Field said:

"* * * To enjoin the officers of the Commonwealth charged with the supervision and management of legal proceedings in her behalf, from bringing suits in her name, is nothing less than to enjoin the Commonwealth for only by her officers can such suits be instituted and prosecuted. This seems to me an obvious conclusion. * * *

There is a wide difference between restraining officers of the State from interfering in such cases with the property of the citizen, and restraining them from prosecuting a suit in the name of the State in her own Courts to collect an alleged claim. Her Courts are at all times as open to her for the prosecution of her demands as they are open to her citizens for the prosecution of their claims."

The result in the Fitts case could not have been other than it was without overruling a long and consistent line of decisions.

X.

THE DOCTRINE ESTABLISHED BY THESE CASES HAS BECOME THE SETTLED RULE OF DECISION.

In every instance in which the case of Fitts v. McGhee has been referred to by this Court, it has been expressly approved. In Cotting v. Godard, 183 U. S. 79, the question was not raised until the case reached this Court. Then as the report shows the Attorney General claimed that the suit was one against the State, basing his claim upon Fitts v. McGhee. The action was directed to be dismissed as to him notwithstanding the fact that in deciding the merits of the case, it was pointed out that the State had no pecuniary interest in the result of the suit.

Prout v. Starr, 188 U. S. 537, was distinguished from the Fitts case, Mr. Justice Shiras saying:

> "• • • On the other hand the judicial power of the United States has not unfrequently been exercised in securing to the several states in proper cases the immunity intended by the Eleventh Amendment."

Citing with other cases Fitts v. McGhee:

• • • • •

> "It is true that the defendant was included in the bill as the Attorney General of the State, but that was because he was one of the Board of Transportation which was directed to enforce the provisions of the Act. The bill did not seek to interfere with the acts of the Attorney General in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood."

The doctrine of the Fitts case was referred to with apparent approval by Mr. Justice Brewer in his opinion rendered in Pacific Steam Whaling Company v. U. S. 187 U. S. 447.

In Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, Mr. Justice Brown said, page 217:

> "The general rule that a Circuit Court of the United States sitting as a Court of Equity cannot stay by injunction proceedings pending in a state court to enforce the criminal laws of such state was applied in Harkrader v. Wadley, 172 U. S. 148, to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in Fitts v. McGhee, 172 U. S. 516, to a suit brought by the Receiver of a railroad against the Attorney General of the State to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the provisions of a state law reducing the tolls which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the State to enjoin the institution of criminal proceedings and hence within the general rule. See also Prout v. Starr, 188 U. S. 537.
>
> Plaintiff seeks to maintain its bill under the exception above noted wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, in which, under a law of Texas, giving express authority to a railroad company or other party in interest, to bring suit against the railroad commissioners of that state, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the State, who, under color of an unconstitutional stat-

> ute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or criminal proceeding. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558."

The rule established by these cases was again expressly affirmed in Barney v. State of New York, 193 U. S. 430, the opinion being delivered by Chief Justice Fuller.

Fitts v. McGhee was incidently referred to but still as an authority in Illinois Central R. R. Co. v. Adams, 180 U. S. 28, and was again cited in Minnesota v. Brundage, 180 U. S. 499.

Finally, in Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, Mr. Justice White in delivering the opinion of this Court said:

> "It is insisted that the Court below had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the State Courts actions authorized by the laws of the State, and hence that the Court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of Section 720 of the Revised Statutes, forbidding the granting of a writ by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted." Citing in re Ayers and Fitts v. McGhee.

The rule, however, which was thus expressly affirmed

was held to be inapplicable to the case under consideration.

If we examine the decisions of the Circuit Courts of the United States, it will be seen that the learned Judges of those Courts have almost, without exception, understood that the rule stated in the Fitts case has never been modified. In Arbuckle v. Blackburn, 113 Fed. 616, Mr. Justice Day, then Circuit Judge, said:

> "What then is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the State from bringing prosecutions for violations of an Act which such officer is expressly charged to enforce in the only way he is authorized to proceed—by bringing criminal prosecutions in the name of the State. This is virtually to enjoin the State from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the State charged with the execution of the criminal laws of the State? While the State may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the State. This view of the case, in our judgment, is amply sustained by the cases above cited and by the later case of Fitts v. McGhee, 172 U. S. 516, in which the subject is fully discussed by Mr. Justice Harlan. In so far as this action seeks an injunction against the respondent from proceeding to enforce by prosecution the provisions of the statutes of Ohio above cited, the Courts of the United States are deprived of jurisdiction by the Eleventh Amendment to the Constitution."

In Ball v. Rutland Railroad Co., 93 Fed. 513, the Court in denying relief referred to Fitts v. McGhee as controlling and said, at page 517:

> "Nothing can be done, if attempted, but by ju-

dicial proceedings; and the Judges of the State Courts are expressly as much bound by these Constitutional provisions as any Judges, and would of course as scrupulously regard them."

Again at page 518:

> "None of the State officers here are alleged to be about or to threaten to interefere in any way with the property or operations of this railroad company but through and at the end of legal proceedings in behalf of the State as mentioned. * * * No reason for any injunction against these officers now appears."

In Western Union Telegraph Company v. Myatt, 98 Fed. 335, Judge Hook, after referring to the distinction to be found between the case of Smyth v. Ames and Fitts v. McGhee, said with reference to the case before him, p. 357:

> "It will be noticed that in the case at bar, the defendants * * * are specially charged with the enforcement of the State enactments under consideration, and that they are not otherwise general officers of the State or charged with the enforcement of all laws generally."

In holding that the suit was one against the State in the case of Union Trust Company v. Stearns, 119 Fed. 790, Circuit Judge Colt said, at page 791:

> "The defendants Stearns and Greenough are not named in the act nor charged with any special duty in connection therewith. They do not occupy any different relation with respect to this penal statute than with respect to other penal statutes of the State. It is their duty * * * to institute proceedings for the enforcement of this statute, just as it is their duty to institute proceedings for the enforcement of other penal laws. They are threatening to do no wrong or trespass against this complainant in any other sense than is involved in the threatened prosecution of all violators of the crim-

inal laws of Rhode Island. If they can be restrained from instituting prosecutions under this act, they equally may be restrained from instituting prosecutions under any criminal law of the State. In this way, the enforcement of every criminal statute of the State might be enjoined by a bill in equity brought in the Federal courts against these defendants until the question of constitutionality has been finally passed upon by the Supreme Court of the United States.

The purpose of the present bill, in substance and effect is to enjoin the State of Rhode Island from the enforcement of a penal statute. Indictments under the acts are brought in the same and on behalf of the State for the protection of the State. These defendants, the Attorney General and his assistant, merely represent the State in such proceedings. They are simply the officers and agents of the State. It is not as individuals, but solely by virtue of their holding such offices, that they prefer and prosecute indictments in the name of the State. A State can only act or be proceeded against through its officers. If a decree could be entered against the State of Rhode Island, enjoining prosecutions under this act, it could only operate against the State through enjoining these defendants. An order restraining the Attorney General and his assistant from the enforcement of this statute is an order restraining the State itself. The present suit, therefore, is as much against the State of Rhode Island as if the State itself were named as a party defendant."

In re Ayers, Fitts v. McGhee and Cotting v. Godard were considered, and with respect to them, Judge Colt said (page 793):

> "These decisions have never been questioned and they are controlling and binding on this Court in the case at bar."

We also refer to the following decisions:

Farmers' Nat. Bank v. Jones, 105 Fed. 459.

Haverhill Gas Light Co. v. Parker, 109 Fed. 694.

Copper Co. v. Freer, Attorney General, 127 Fed. 199.

Conetet v. Weir, 127 Fed. 897.

Coulter v. Fargo, 127 Fed. 912.

Hitchcsen v. Smith, 140 Fed. 983.

Smith v. Alexander, 146 Fed. 106.

Telegraph Co. v. Anderson, 154 Fed. 95.

Conclusion.

It is respectfully submitted that the law upon this subject may be stated as follows:

1. The State may not be sued without its consent.

2. A suit to restrain the Attorney General of a State from bringing judicial proceedings in the name of the State to enforce the laws of the State, is one which restrains the State itself, and the suit is consequently as much against the State as though it were named as a party defendant on the record.

3. A trespasser or wrongdoer interfering with or seizing private property is not protected from suit by the fact that he claims to be or is acting as the officer of a State. He must establish the propriety of his act.

4. An administrative officer upon whom is imposed a mere ministerial duty is not as to the performance of that duty beyond the control of the judicial department.

5. But in any case, without regard to the grade of

the officer, if the State is pecuniarily interested, or if the decree sought would effect property of the State, the suit will be considered one against the State.

Read in the light of these principles, we find no variance in the decisions of this Court. Upon the contrary, they furnish a long and absolutely uniform current of authority which demonstrates the correctness of our present contention.

All of which is respectfully submitted.

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

No. 10, Original, October Term, 1907.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, *Petitioner*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS.

Frank B. Kellogg,
Cordenio A. Severance,
Robert E. Olds,
Stiles W. Burr,
Of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES,

No. 10, ORIGINAL, OCTOBER TERM, 1907.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, *Petitioner.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS.

PRELIMINARY STATEMENT.

The injunction for violation of which petitioner was adjudged to be in contempt was granted in a suit by certain stockholders of the Northern Pacific Railway Company against that company and certain individual defendants, among whom were the present petitioner and the members of the Railroad and Warehouse Commission of Minnesota. The record before the court on this petition sufficiently shows, as we believe, that this was one of a number of similar suits commenced in the same court at the same time against nine of the principal railroad companies operating in Minnesota; each by bill in equity filed by a stockholder or stockholders of such railroad company against the company itself and

against petitioner and the individuals who then held office as members of the Railroad and Warehouse Commission. In some of the cases, although not in all, persons alleged to be representative shippers were joined as defendants, as representing that numerous and most interested class.

The record also shows that these several suits were heard and argued together, and that the two opinions rendered by the court below applied equally to all of the cases. And while it does not affirmatively so appear upon the record, we think it fairly inferrable from what does there appear—and it is the fact—that the pleadings and proceedings in the several suits were substantially similar in those particulars which are material to the determination of the present petition; and that the injunction granted in each case was practically identical with that in the Northern Pacific case. It is also apparent that petitioner's disobedience of the injunction was merely formal and for the purpose of making up a "test case" in this court on petition for writ of habeas corpus. Hence it is clear that although the petitioner selected the Northern Pacific injunction for his attack, the complainant stockholders in each of the other cases are equally interested in maintaining the integrity of the injunction which petitioner has violated.

In the court below one of counsel signing this brief appeared as solicitor for the complainant in one of those suits, viz: that against the Chicago Great Western Railway Company. And in that interest he, together with counsel for the several complainants in the other cases, has been authorized to appear in this proceeding as

representing the respondent Marshal, for the purpose of defending the jurisdiction of the Circuit Court as against the attack now made upon it; the Marshal himself being, in reality, a mere formal party without interest in the result.

The other counsel who sign this brief have for years acted as legal advisers of the Chicago Great Western Railway Company. The position in which that company, in common with the other railroad companies concerned in this litigation, is put by the present proceeding is one of singular difficulty and embarrassment. The company is bound by the injunction of the Circuit Court, which forbids it to put into effect the rates prescribed by the act of April 18th, 1907, hereinafter referred to, or otherwise to yield obedience to that act. The discharge of petitioner upon writ of habeas corpus can only follow a decision by this court that so much of the injunction as applies to petitioner, as Attorney General, is void for want of jurisdiction over him, because the Eleventh Amendment exempts him from control of the Federal courts. And that conclusion can only be arrived at upon the ground that it is beyond the power of the courts of the United States to prevent the prosecution of criminal proceedings in the State courts, against the railroad companies and their officers and employes, under the penalty provisions of the act in question, to punish them for failure to comply with the terms of the act.

Consequently the success of petitioner in this proceeding will leave every railroad company and its employes and officers in that unfortunate posi-

tion where to obey the injunction of the Circuit Court is to be subjected to indictment and prosecution in the State courts, upon a criminal charge, against which the Federal court is powerless to give protection; and where obedience to the State statute, under coercion of such prosecutions, involves contempt of the Circuit Court in the violation of its injunction.

The railroad companies are defendants in these suits, and however sincerely they and their officers and counsel may believe that the cause of the complainant stockholders is right and should prevail, they have felt constrained to hold themselves aloof from participation in the proceedings and indifferent to the result. But when injunctions restraining the railroads from adopting the rates prescribed, and from otherwise complying with the act, have been ordered, the railroads are most deeply concerned that those injunctions should be broad enough in their application to protect them and their officers and employes from being subjected to criminal prosecutions as a consequence of obeying the injunctions. And it is precisely that question which is involved in this proceeding.

Hence, counsel for the Chicago Great Western Railway Company, being duly authorized by respondent to appear herein on his behalf, join with counsel for the complainant stockholder in this argument in support of the injunction granted by the court below, in so far only as that injunction applies to and binds petitioner as Attorney General.

We understand that other briefs are to be filed on behalf of respondent, and that at least one such brief will contain a full statement of the case, viewed from the standpoint of the real respondents. Therefore, we assume that it is neither necessary nor desirable that this brief should include any extended statement of the facts. But the argument will probably be more intelligible if prefaced with a brief statement of the objects of the bill upon which the injunction was granted, and of the grounds for relief stated therein, in so far as they raise a Federal question. The rate regulations attacked were:

(a) An order made by the Railroad and Warehouse Commission September 6th, 1906, establishing a schedule of maximum rates for all of the so-called "classified" freights; which order had been complied with, and the rates prescribed therein put into effect, before the commencement of suit.

(b) An act of the legislature of Minnesota, approved April 4th, 1907, prohibiting a charge of more than two cents per passenger mile for the carriage of passengers; which act also had been complied with, and the rates put into effect, before suit was commenced.

(c) An act of the legislature approved April 18th, 1907, prescribing a schedule of maximum rates for the carriage of the so called "commodity" freights (grain, grain products, live stock, lumber and coal); which had not gone into effect when the suit was brought.

The bill also attacks another order of the Commission dated May 3d, 1907, which was in its nature supplementary to the order of September 6th; but as that order applied to the Northern Pacific alone, and is not common to all the cases, no reference to it will be made in this brief.

It is alleged in the bill, as to each of these regulations, that the rates so prescribed are substantially lower than the rates previously in force, and are so low as to be insufficient to yield a reasonable compensation for the service required. And the bill (as amended) charges:

(a) That the rates sought to be imposed are unreasonably low and confiscatory, and that the enforcement thereof would amount to a taking of property without due process of law, and to a denial of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment.

(b) That the penalties for non-compliance prescribed in said acts are so drastic and unreasonable as to amount to a denial of due process of law and of the equal protection of the laws, contrary to the Fourteenth Amendment.

(c) That the nature of the attempted rate regulations is such that, upon the facts set forth in the bill, they amount to a regulation of and interference with interstate commerce, and are therefore void.

The prayer of the bill is that the defendant Railway Company be enjoined from maintaining the rates pre-

scribed by the Commission's order of September 6th, 1906, and the act fixing passenger rates (both of which had already been put into effect) and from putting in force the rates prescribed by the act of April 18th, 1907; and that the defendants who, although sued as individuals, were alleged to hold office as members of the Railroad and Warehouse Commission and as Attorney General, and the defendant shippers and the class represented by them, be enjoined from instituting proceedings to enforce the rate reductions prescribed, whether by civil suit or mandamus, or by criminal prosecution under the penalty clauses.

The Circuit Court declined to interfere by interlocutory injunction with the rates already in force—those fixed by the Commission's order and by the passenger fare act—but awarded a temporary injunction against the adoption or enforcement of the commodity rates prescribed by the act of April 18th. In disregard of the order petitioner sued out, in the state court, an alternative writ of mandamus against the Northern Pacific Railway Company, ostensibly for the purpose of compelling it to put the enjoined rates into effect notwithstanding the injunction. As a matter of fact, however—and the record makes this perfectly plain—petitioner's sole object in the mandamus suit was to invite punishment by the Circuit Court for the contempt involved in his violation of its injunctional order, so that he might secure an immediate decision in this court, by means of the summary process of habeas corpus, upon the ques-

tions argued by him (and determined adversely to his contentions) in the court below; instead of pursuing the ordinary and orderly methods of appeal. On motion of the solicitors for the complainants in the Northern Pacific case, the Circuit Court accepted the invitation and adjudged petitioner (according to his desires) guilty of contempt; whereupon this petition was filed.

ARGUMENT.

I.

THE OBJECTIONS WHICH PETITIONER MAKES AGAINST THE VALIDITY OF THE INJUNCTIONAL ORDER ARE MATTERS WHICH CANNOT BE INQUIRED INTO ON WRIT OF HABEAS CORPUS.

At the outset we are met with the question whether, upon a proceeding of this sort, this court will review the injunctional order for contempt of which petitioner is held. Petitioner very properly concedes, on pages 8 and 9 of his preliminary brief, that this court will not permit the writ of habeas corpus to take the place of or be converted into a writ of error or appeal, and that where the writ is resorted to for review of a punishment for contempt of the present character, it must appear that the order or judgment which was violated was wholly without and beyond the *jurisdiction and authority* of the court, and therefore *void*—that no ordinary defect or infirmity therein will be held to excuse a violation thereof. As said in the comparatively recent case of In re McKenzie, 180 U. S. 536:

"The writ of habeas corpus cannot be availed of

> as a writ of error; and unless the writs or orders, for a violation of which petitioner is being punished, in the case referred to in the petition, were *absolutely void*, this application must be denied. * * * The distinction between a total want of power and a defective exercise of it is obvious, and want of power cannot be predicated of mere errors."

It has been held by this court over and over again, that where the contempt, the punishment for which is under review in a habeas corpus proceeding, consists of the violation of an order or decree of a court, the commitment will be sustained unless it is found that the order or decree disobeyed was *absolutely void* because the court was wholly without jurisdiction or power to make it. In short, as this court has put it in several of the cases cited below, the proceeding is in the nature of a collateral attack upon the order or judgment which has been disobeyed, and "the inquiry is limited to the question of jurisdiction."

It is frequently said in the cases cited, as it was by Chief Justice Marshall in the leading case of *Ex parte* Watkins, 3 Pet. 193, that habeas corpus will not lie "unless the judgment be an *absolute nullity;* and it is not a nullity if the court has general jurisdiction of the subject, although it should be held erroneous." See: In re Coy, 127 U. S. 731, 757; In re Wilson, 140 U. S. 575, 583.

Some of the cases say that the commitment for contempt must be sustained unless the court was wholly without "jurisdiction *or authority*," or without "jurisdiction *or power*," to make the order which has been questioned; but in other cases it is made sufficiently

plain that the words "authority" and "power," as so used, refer only to the matter of *jurisdiction.*

Among the very numerous cases which deal with this question the following are most nearly in point:

Ex parte Watkins, 3 Pet. 193.
Ex parte Yarbrough, 110 U. S. 651.
In re Coy, 127 U. S. 731, 756.
In re Wilson, 140 U. S. 575, 582.
In re Delgado, 140 U. S. 586.
In re Schneider, 148 U. S. 162.
In re Frederich, 149 U. S. 70, 76.
In re Tyler, 149 U. S. 164, 180.
In re Swan, 150 U. S. 637, 648.
In re Chapman, 156 U. S. 211.
In re Lennon, 166 U. S. 548.
In re McKenzie, 180 U. S. 536.

In the Chapman case, Mr. Chief Justice Fuller says:

> "The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is *without jurisdiction*, and that it cannot be used to correct errors."

In Ex parte Yarbrough, Mr. Justice Miller says:

> "It is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter *wholly beyond or without the jurisdiction* of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention; and if found to be as charged, a matter of which such a court *had no jurisdiction*, to discharge a prisoner from confinement. (Citing cases.) It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error by which errors of law committed by the court that passed the sentence can be reviewed here. * * * Its decision on the conformity of the indictment to the provisions of the statute may

> be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such a writ was allowed, but which cannot be looked into on a writ of habeas corpus, *limited to an inquiry into the existence of jurisdiction on the part of that court.*'

This language is quoted with approval in In re Coy, supra, and the same principle is reaffirmed, in somewhat different language, upon the authority of the Yarbrough case, in In re Wilson, In re Delgado, In re Frederich and In re Chapman, supra.

In the Frederich case, referring to the rule laid down in the Yarbrough case, Mr. Justice Jackson says (on page 76):

> "The reason of this rule lies in the fact that a habeas corpus proceeding is a *collateral attack of a civil nature* to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises."

This view of the law, now well understood and accepted, finds its root in the reasoning of Chief Justice Marshall in the case of Ex parte Watkins, where he makes it plain that the writ of habeas corpus is, as stated in the Frederich case, in the nature of a collateral attack upon the judgment which is the basis of commitment, and that no infirmity therein will be considered upon that review except such as would support any other form of collateral attack thereon, viz.: a want of jurisdiction.

These principles, however, seem to be fully recognized by petitioner and his counsel, and their argument (so far as indicated by petitioner's preliminary brief) is along this line. Petitioner's contention is neither more nor less than that the Circuit Court was without jurisdiction to entertain the suit or to grant an injunction against him for the following reasons:

1. That there was not the requisite diversity of citizenship to confer jurisdiction upon that ground.

2. That the bill does not sufficiently present a federal question which justified the court in assuming jurisdiction upon that ground.

3. That the court was without jurisdiction over petitioner because, as Attorney General of the State of Minnesota, he was exempt from suit of this character under the Eleventh Amendment.

Now the proposition that the injunctional order, for violation of which the petitioner was adjudged in contempt, was void for want of jurisdiction, and could therefore be ignored or disobeyed with impunity, because an "absolute nullity" and subject to collateral attack in any form of proceeding, is most effectually demolished by the decision of this court in Illinois Central v. Adams, 180 U. S. 28. And we think the points there decided, and the reasons for such decision, will sufficiently appear from the following extracts from the opinion therein:

"The question whether this is a suit against the

State within the Eleventh Amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another State, is also one which we think *belongs to the merits rather than to the jurisdiction.* If it were a suit directly against the State by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State but against Adams individually, and if the requisite diversity of citizenship exists, or if the case arises under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in Osborn v. Bank of the United States, 9 Wheat. 738, 858, wherein he makes the following observation: 'The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, *the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants;* whether they are to be considered as having a real interest, or as being only nominal parties.' It may be said in a certain sense that the judicial power does not extend to civil suits (at least if begun by capias) against members of Congress or of the state legislatures, pending the session; or against witnesses going to, attending or returning from courts of justice; or against bankrupts for causes for action arising before bankruptcy and covered by the discharge; or against infants upon their general contracts; or against the owners of vessels who have petitioned for a limitation of liability, but it was never doubted that such power extended to an examination of the question whether the defendant was entitled to the exemption of liability claimed by him, and in passing upon this question the court necessarily assumed

> jurisdiction of the cause. In the great case of Chisholm v. Georgia, 2 Dallas 419, it was never intimated, either by court or counsel, that the question of the suability of the State was not within the jurisdiction of the court to decide, the whole argument being addressed to the question of nonliability to a citizen of another State. * * * But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, *he does not raise a question of jurisdiction in its proper sense.* As already observed, this question depends upon the language of the statute, although the word "jurisdiction" is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case. To put a familiar test: *Can it be possible that if the plaintiff company were to succeed in this suit, the decree in its favor could be attacked collaterally as null and void for want of jurisdiction,* by reason of the fact that the bill failed to allege a compliance with the Ninety-fourth rule in equity, or *because the defendant was really a representative of the State, and the suit was in fact a suit against the State?* * * * In Fitts v. McGhee, 172 U. S. 516, where a suit was brought against state officers to enjoin them from proceeding under an alleged unconstitutional law, the question whether they were representatives of the State was disposed of upon answers filed by officers of the State."

It seems to us that these authorities are absolutely conclusive against petitioner in this proceeding. If upon habeas corpus the inquiry is limited to the question of jurisdiction, and if the question whether an individual defendant, in his official capacity, so represents the interest and liability of the State that the suit is in fact a suit against the State and prohibited by the Eleventh Amendment, is not a question of jurisdiction, as held in the Adams case; then the court cannot, in

this proceeding, inquire into the validity of the injunctional order in that respect, and the writ must be denied.

The facts of this case bring it well within the rule of the Adams case. The suit was not against the State of Minnesota in name or in form; and the relief asked against petitioner was that he be enjoined from proceeding, to the injury of complainants and the railroad company of which they were stockholders, under color of his official authority, for the enforcement of state legislation alleged to be void under the Constitution of the United States. That in one case it is an Attorney General of the State, and in the other its chief revenue officer, who is enjoined, affords no valid ground for distinction. Neither can any distinction be founded upon the claim that the question in the Adams case was one of procedure merely. The question as to what matters are open for review upon a writ of habeas corpus is likewise a question of procedure; and the principles invoked in the Adams case are equally applicable to either question.

It has over and over again been decided in the cases cited above, commencing with the decision of Chief Justice Marshall in the great case of Ex parte Watkins, down to the case of In re Frederich, 149 U. S. 70, that the proceeding by writ of habeas corpus is in the nature of a collateral attack upon the judgment questioned; and that only such defects therein which could be made the subject of collateral attack in other forms of proceeding, can be reviewed on habeas corpus. Indeed, this same doctrine is reaffirmed, in language only slightly less explicit, as late as In re McKenzie, 180 U. S. 536.

And in the Adams case it is said (we think the language appropriate enough to justify repetition):

> "Can it be possible that if the plaintiff company were to succeed in its suit, the decree in its favor could be attacked collaterally as null and void for want of jurisdiction, * * * because the defendant was really a representative of the State, and the suit was in fact a suit against the State?"

It is true that in the Ayers case, 123 U. S. 443, the writ was granted under circumstances substantially like those in the case at bar. But the question now before us was not there suggested by either party nor passed upon by the court; it being assumed, without discussion, that the validity of the injunctional order raised a jurisdictional question. That case, therefore, is not authority against the present contention. But even if the Ayers case were conceded to establish the proposition that the question whether an individual is, under the Eleventh Amendment, exempt from suit in his official capacity as a representative of the State, is a jurisdictional question which can be inquired into collaterally upon writ of habeas corpus; then the case must be deemed overruled, or at least limited, by the later declaration of the court in the Adams case.

Nor can it be claimed that the point decided in the Adams case, as set forth in the foregoing extracts from the opinion, was unnecessary to the disposition of the case. We are not required to enlarge upon this, since the foregoing quotations from the opinion sufficiently defend the decision against that charge. And in answer to the suggestion, if it be made, that the decision might have been rested upon another ground, and consequently that the remarks quoted must be deemed

obiter, we need only refer to Union Pacific v. Mason City & Fort Dodge Ry. Co., 199 U. S. 160, 166, where Mr. Justice Brewer said:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. * * * See Railroad Companies v. Schutte, 103 U. S. 318, in which this court said: 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.'"

Neither has the rule of that case been in any way limited, qualified or criticised by any subsequent declaration of this court or of any Circuit Court or Court of Appeals. It is, moreover, supported by the reasoning of Chief Justice Marshall in the leading case of Osborn v. Bank of the United States, 9 Wheat. 738, referred to by the court in the Adams case.

Much that has been said applies equally to petitioner's point that the bill does not show the requisite diversity of citizenship, and that this also is a jurisdictional question which can be inquired into upon the present proceeding. But there are other authorities more directly in point upon that particular proposition. For it has been held squarely in a number of cases, some of them habeas corpus cases, that where the Circuit Court has assumed jurisdiction, that jurisdiction cannot be made the subject of collateral attack upon the ground that the requisite diversity of citizenship does not exist.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552.
In re Sawyer, 124 U. S. 200, 221.
In re Tyler, 149 U. S. 164, 181.
Dowell v. Applegate, 152 U. S. 327.

See also the opinion of Mr. Justice McKenna, then Circuit Judge, in In re Eaton, 51 Fed. 804; likewise a habeas corpus case.

II.

THE POWER OF THE COURT TO ISSUE THE WRIT OF HABEAS CORPUS IN CASES LIKE THE PRESENT IS DISCRETIONARY; AND THAT DISCRETION SHOULD NOT BE EXERCISED IN FAVOR OF PETITIONER UNDER THE CIRCUMSTANCES OF THIS CASE.

It is held in a number of cases, notably in Ex Parte Royall, 117 U. S. 241, that it is always a question for the *discretion* of the court whether the writ shall be granted, even where it is conceded that the writ will lie. And we submit that this is not a case where that dis-

cretion should be exercised in petitioner's favor, even if the court shall be of the opinion that the writ is justified in law.

The true office of the writ of habeas corpus is to safeguard and protect the liberty of citizens—not to serve as a cheap and convenient substitute for an appeal. It is a high prerogative writ whose aid should be invoked only in cases of necessity where no other remedy avails, and the court ought not to suffer it to be the easy resort of a suitor too impatient to bring his cause to this court through the door of its ordered and orderly procedure. To grant the writ in this case is to set the seal of approval upon a practice which, we submit, ought not to be encouraged—the practice of defying and disobeying injunctions and decrees of the Federal courts in order to secure an immediate review in this court of jurisdictional questions arising in civil causes, instead of pursuing the regular, but slower, course of appeal or writ of error.

Will it not put a premium on disrespect of the orders of lower courts, if such disrespect provides a "short-cut" to a hearing in this court on jurisdictional questions? No class of questions must so frequently be decided by the Federal courts as questions of jurisdiction. Is it well that parties aggrieved by error in the decision of such questions, should be encouraged to seek review by this court by means of a procedure which is founded upon open defiance of the court below? Yet the practice which the Attorney General of Minnesota has pursued, if sanctioned by this court, offers many temptations to the impatient litigant.

For this is plainly a "made-up case"—a plan conceived by the Attorney General and his associates for the purpose of bringing before this court, by the "short-cut" route, a question which might have been brought up in the regular way, by appeal, had they not been too impatient to abide the ordered course of practice. And it is a mere case of *impatience*—no necessity drove the Attorney General; no public interest would have suffered serious harm had he pursued the regular procedure.

Were this a case where the Attorney General's disobedience of the injunction was due to misunderstanding, or was dictated by public necessity, or where in no other way could a review of the injunctional order be obtained, it might be a case for the exercise of the discretionary powers of the court. But the Attorney General's violation of the injunctional order was studied and deliberate, and for the sole purpose of inviting a commitment for contempt upon which to base this petition. Had he been driven by the mistaken conviction that the State law must be enforced at any cost, notwithstanding the position of the Federal courts, he would have proceeded all along the line, instead of by technical disobedience of this one injunction, carefully selected for the purpose as the one offering the best record on his petition for habeas corpus.

Nor is there excuse for his course upon the ground that not otherwise could the ruling of the court below have been reviewed. A direct appeal to this court will lie from the final decree in these suits; and from the order awarding the temporary injunction an appeal lies

to the Circuit Court of Appeals (indeed, it is perhaps not amiss to say that an appeal to that court has already been taken). Either such appeal will present every question which the Attorney General here attempts to raise, and other questions of importance which cannot be considered in this proceeding. Neither will the regular procedure entail undue delay. Had the Attorney General elected to stand upon his demurrer, there might have been an early hearing in this court. And by the statute the Circuit Court of Appeals is required to give precedence over other cases to an appeal from an order granting an interlocutory injunction. And in case of an adverse decision by that court it would be open to the Attorney General to apply to this court for writ of certiorari to review these very questions.

Nothing here said should be understood to impugn the motives of the Attorney General and his associates, for whom we have the highest respect and regard. The good faith of our opponents is beyond question; but we think the method which has been adopted for bringing this controversy before the Supreme Court is decidedly open to criticism.

III.

EVEN IF IT WERE CONCEDED THAT PETITIONER'S OBJECTIONS TO THE INJUNCTIONAL ORDER COULD BE CONSIDERED UPON THIS PROCEEDING AS FULLY AS UPON A REGULAR APPEAL, NEVERTHELESS THAT ORDER MUST BE SUSTAINED UPON THE MERITS.

It is the settled rule of this court that the writ of habeas corpus will not be granted where it appears from the record that upon return of the writ the petitioner will be remanded to custody. Thus, conceding that the questions which petitioner seeks to raise are reviewable upon habeas corpus, we come to the merits of the claim that the injunction against petitioner was void because the court below was without jurisdiction to entertain the suit, either upon the ground of diverse citizenship or upon the ground that a Federal question was presented, and because the suit against petitioner was in effect a suit against the State and prohibited by the Eleventh Amendment.

We need not waste time upon the proposition that the bill does not show the requisite diversity of citizenship. As already explained, the objection cannot be made the ground for collateral attack in a proceeding like this. Moreover it is immaterial whether jurisdiction can be supported upon the ground of diverse citizenship, if a Federal question is presented.

1.

THE CASE INVOLVES A FEDERAL QUESTION SUFFICIENT TO SUSTAIN JURISDICTION UPON THAT GROUND ALONE.

The proposition that no Federal question is presented by the bill is dealt with in subdivision III (pp. 11-13) of petitioner's preliminary brief. It was much relied on in the court below, and we assume it will be enlarged upon in the more elaborate brief which we understand the Attorney General will present at the hearing. In essence, however, the proposition amounts to just this: that the bill does not sufficiently present a Federal question, because the point that the Minnesota rate legislation amounts to an interference with interstate commerce is merely frivolous, and because the claim that the rates are confiscatory, and the legislation therefore unenforceable under the Fourteenth Amendment, merely involves the application of settled principles of constitutional law to a disputed question of fact.

The charge that the penalty provisions of the law attacked are violative of the Fourteenth Amendment is calmly ignored; although as to this see:

Cotting v. Kansas City Stock Yards Company, 183 U. S. 79, 99-102.
Consolidated Gas Company v. Mayer, 146 Fed. 150.
Ex parte Wood, 155 Fed. 190.

We understand that one of the other briefs to be filed on behalf of respondent will discuss the question whether the point that these rates amount to an interference with interstate commerce may be considered frivolous, and nothing will be said here on that subject.

But even if the only question presented by the bill were whether the rates are confiscatory, and the legislation therefore unconstitutional and void under the Fourteenth Amendment, the claim that this does not involve a Federal question sufficient to give the court jurisdiction irrespective of citizenship deserves scant attention. Petitioner's idea seems to be that no case which involves the application, to a disputed state of facts, of a clause of the constitution which has been frequently before the court for construction, can ever be held to present a controversy over which the Federal courts have jurisdiction without diverse citizenship. This is best answered in the language of the late Judge Thayer, delivering the opinion of the Court of Appeals for the Eighth Circuit in Hastings v. Ames, 68 Fed. 726. The inquiry in that case was whether the appeal involved a question arising under the Constitution of the United States, in which event the appeal would lie direct to the Supreme Court, and the Court of Appeals would be without jurisdiction. So that although presented in different form, the essential question for determination was identical with that now before us.

> "It is manifest, therefore, that the suits at bar are cases in which it was claimed that a law of a state contravenes the Constitution of the United States. * * * In opposition to this view it has been suggested that the question which arises on these appeals is simply whether the rates prescribed by the Nebraska statute are unreasonable and unjust, *and that this is not a constitutional question, but an ordinary issue of fact.* It is true, no doubt, that the issue is one of fact; but a finding is required upon that issue solely for the purpose of deciding the ultimate question, which arises in the several suits, whether the state statute prescribing the rates is constitutional or otherwise. When the

validity of a statute is challenged on the ground that it violates the organic law, it is ordinarily the case that the question can be determined by a simple inspection of the statute; but it may happen, as in the present case, that it can only be determined in the light of extrinsic facts which serve to demonstrate the necessary effect and operation of the statute. Now, it matters not, as we think, how a decision in such case is to be reached, whether it be by a simple comparison of the statute with those limitations upon legislative power which are imposed by the constitution, or by an investigation and decision of a preliminary issue of fact. If in a given suit, the ultimate question involved is whether a state statute is void, either because it impairs rights that are guarantied by the Federal constitution or because the legislature of a state has assumed to exercise powers that have been surrendered to the general government, then the case is one which does not fall within the appellate jurisdiction of this court."

2.

NEITHER THE SUIT ITSELF NOR THE INJUNCTION AGAINST PETITIONER ARE WITHIN THE PROHIBITION OF THE ELEVENTH AMENDMENT.

Upon the merits of the case the principal question is whether the court was without jurisdiction to entertain the suit against petitioner, or to grant an injunction against him, because as Attorney General of the State he is exempt from suit under the Eleventh Amendment; and to that question the remainder of this brief will be devoted.

Petitioner relies almost wholly upon the authority of Fitts v. McGhee, 172 U. S. 516. Indeed, it is probably safe to say that if it were not for that case, this matter would never have reached the court in its present form.

For that reason—and because the same principles and authorities would necessarily be referred to in determining whether the Eleventh Amendment controls this case, regardless of the decision in Fitts v. McGhee—the subject may be treated in the form of an inquiry whether the rules laid down in that case apply in the present case, and if so, whether it is sound in principle or sustainable on authority. These questions we present in the shape of the following propositions:

(a) That if the application of Fitts v. McGhee to the facts of the present case be conceded, it will be found that it is irreconcilable in principle with other decisions of this court on the subject, and that it has been overruled by later decisions.

(b) That Fitts v. McGhee is distinguishable from and ought not to control the present case.

(c) That if the doctrine of Fitts v. McGhee is held to apply to the present case, we submit that it should be overruled upon the grounds suggested in Prout v. Starr, 188 U. S. 537, viz: that the Eleventh Amendment should not be given a construction which would tend to impair the full efficacy of the protecting clauses of the Fourteenth Amendment.

These points may be considered in the order of their statement.

(A.)

The doctrine of Fitts v. McGhee, if held applicable to the facts of the present case, is not supported by any other decision of this Court, is inconsistent with the uniform current of authority, and has been overruled by later decisions of this Court.

In Fitts v. McGhee three principal propositions are decided:

> First, that under the circumstances of that case, a suit against the Attorney General to restrain him from enforcing the legislative regulations there in question was in effect a suit against the State and forbidden by the Eleventh Amendment.
>
> Second, that under the circumstances of that case, the Federal Court was without jurisdiction to restrain criminal prosecutions, then pending in the courts of that State, for violation of the rate regulations there considered.
>
> Third, that in cases like that then before the court, the writ of habeas corpus is not a proper remedy, but that defendant should be put to his defense on the criminal charge in the state courts, and look for protection to a review by the United States Supreme Court, on writ of error to the State Supreme Court, should that court affirm his conviction.

Fitts v. McGhee stands alone. No other case has gone to that length (if we except a few subsequent Cir-

cuit Court decisions, which follow and apply the rule of Fitts v. McGhee upon the assumption that they are bound by the authority of that case) and we submit that there is no other case like it in principle. It has been cited in several subsequent decisions of this court; but while the decision has never been expressly and in terms criticised or qualified, we think it will be found, upon examination of the cases in which it has been cited, that its doctrines have never been followed, applied or extended. On the contrary, it has been squarely overruled, upon the second proposition stated above, by the later cases of Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, and Dobbins v. Los Angeles, 195 U. S. 223, 241, to which more extended reference will be made hereafter. And on the first proposition stated we think it altogether inconsistent in principle with the subsequent case of Prout v. Starr, 188 U. S. 537, and other still more recent cases.

The only case which has any tendency to support the decision in Fitts v. McGhee upon the proposition that suit against the Attorney General, under the circumstances there appearing, is in effect a suit against the State within the meaning of the Eleventh Amendment, is In re Ayers, 123 U. S. 443. Indeed, this is the only authority cited or relied upon in the opinion on that branch of the case. The other cases referred to in that part of the opinion are either cited as authority for points made incidentally, and do not bear at all upon the main question, or are cases where the contrary view was taken, and are referred to only to be distinguished.

But the Ayers case is not in point, and does not support the doctrine of Fitts v. McGhee in any direct sense. If it were not for the application made in Fitts v. McGhee of the doctrine of the Ayers case, it would hardly occur to any lawyer, at this day, that the rule of the Ayers case could possibly apply to the situation in the Minnesota rate cases. It is unnecessary for us to work out the distinction between the Ayers case and cases like the present one, since that task has been performed so frequently and effectively by this court itself. It was done in direct terms in Pennoyer v. McConnaughy, 140 U. S. 1, where the court said, (pp. 9-10):

> "It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision * * *. It is equally well settled that a suit against the officers of a State, to compel them to do acts which constitute a performance of its contracts, is, in effect, a suit against the State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as *to compel it to specifically perform its contracts.* In re Ayers, 123 U. S. 443, Louisiana v. Jumel, 107 U. S. 711, Antoni v. Greenhow, 107 U. S. 769, Cunningham v. Macon & Brunswick R. R., 109 U. S. 446, Hagood v. Southern, 117 U. S. 52. The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and prop-

erty of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State. Osborn v. Bank of the United States, 9 Wheat. 738; Davis v. Gray, 16 Wall. 203; Tomlinson v. Branch, 15 Wall. 460; Litchfield v. Webster County, 101 U. S. 773; Allen v. B. & O. R. R. Co., 114 U. S. 311; Board of Liquidation v. McComb, 92 U. S. 531; Poindexter v. Greenhow, 114 U. S. 270."

This language is quoted with approval, and the principle applied, in Reagan v. Farmers Loan & Trust Company, 154 U. S. 362, and in Tindall v. Wesley, 167 U. S. 204, where the words underscored in the foregoing quotation are italicized by the court in its opinion; and by Sanborn, J. in Starr v. C. R. I & P. Ry., 110 Fed. 3.

The same principle of distinction is applied, in varying language and with greater or less explicitness, in a number of other cases decided since the Ayers case, among which are:

In re Tyler, 149 U. S. 164.
Scott v. Donald, 165 U. S. 107.
Smith v. Reeves, 178 U. S. 436.
C. & N. W. Ry. v. Dey, (Brewer, J.) 35 Fed. 866.

In Pennoyer v. McConnaughy, Mr. Justice Lamar further says, on page 12:

"But the general doctrine of Osborn v. Bank of the United States, that the Circuit Court of the

United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from."

And again, on page 16:

"The same distinction was pointed out in Hagood v. Southern, (117 U. S. 52) which was held to be in effect a suit against the State, and it was said: 'A broad line of demarcation separates from such cases such as the present, in which the decrees require by affirmative official action on the part of defendants, *the performance of an obligation which belongs to the State in its political capacity*, those in which actions at law or suits in equity are maintained against defendants, who, while claiming to act as officers of the State, violate and invade the personal and property rights of the complainants, under color of authority unconstitutional and void.'" (The italics are those of the opinion itself.)

In C. & N. W. Ry. Co. v. Dey, 35 Fed. 866, Mr. Justice Brewer (then Circuit Judge) said:

"It must also be noticed that sometimes the relations of the state to its citizens and others is a purely business relation, while again it is entirely governmental. * * * And in all the cases where the state was not a party to the record, and yet the judgment of the Supreme Court was that it was a real party in interest, and therefore the Federal court without jurisdiction, it will, I think, be found that some *contract* of the State was the foundation of the litigation; and that those suits, though nominally against state officers, were construed by that court as in fact suits to compel performance by the state of its contracts, or to prevent it from carrying into effect measures intended to work a repudiation. Besides the case In re Ayers, supra, may be noticed

as leading cases in this line of decision: Louisiana v. Jumel, 107 U. S. 711; Antoni v. Greenhow, 107 U. S. 769; Hagood v. Southern, 117 U. S. 52. On the other hand, the state in its governmental relation to its citizens and others within its jurisdiction enacts laws designed to regulate the dealings of one individual with another, or between corporations and individuals. In these matters, although in a certain sense the state is interested, as it is in all matters affecting the welfare and happiness of the people, yet it is interested only in a general sense, and not in that direct pecuniary sense which makes it, in the language of the law, the real party in interest—the one to be affected by litigation in which the constitutionality of such enactments is challenged. It is not the party against whom the relief is asked, or upon whom the judgment operates. * * * Whether the shipper shall pay to the railroad, and the railroad exact from the shipper, 10 cents a hundred or 50 cents a hundred for the carriage of goods, is not a matter in which the state, as a state, is interested other than in the general sense heretofore mentioned. No contract of the state is involved in litigation; no judgment can be rendered which affects it as a corporate entity; and it is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation which is involved in this inquiry is governmental in its nature; not contractual. No obligation that the state has entered into, no contract or promise that it has made, is challenged. There is no attempt to compel the performance of a contract, or prevent repudiation by the state. The real parties in interest are the shippers and carriers; and the judgment operates in reality upon these parties alone."

In Reagan v. Farmers' Loan & Trust Company, in further discussion of this particular point, and following the quotation from Pennoyer v. McConnaughy which is first above given, Mr. Justice Brewer said:

"Appellants invoke the doctrines laid down in

these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State. * * * We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of adverse judgment. * * * It is not nearly so much affected by the decree in this case as it is by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

The cases thus far referred to have been cited primarily for the purpose of showing that the Ayers case, rightly understood, furnishes no support to the decision of Fitts v. MvGhee; and that the latter case is out of step with the principles which had, prior to its decision, controlled this court in the construction and application of the Eleventh Amendment. We now come to a consideration of those cases which deal with a state of facts like that in the case at bar, and which we claim

to be squarely in conflict with Fitts v. McGhee, in the view of that case which makes it applicable to the present situation.

The first of these is Reagan v. Farmers' Loan & Trust Company, already cited. In the Reagan case the facts were practically identical with those of the present case in all essential respects, except in the two particulars hereafter referred to. In that case the decree of the court was as follows:

> "* * * That the defendants, the Railroad Commission of Texas, and the defendants John H. Reagan, William P. McLean and L. L. Foster, acting as the Railroad Commission of Texas, and their successors in office, and Charles H. Culberson, *acting as Attorney General of the State of Texas, and his successors in office*, be and they are hereby perpetually enjoined, restrained and prohibited from instituting, authorizing or directing any suit or suits, action or actions against the defendant Railroad Company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the State of Texas, etc., etc."

Although the decree was reversed in part, the portion quoted above was affirmed after full argument and consideration. The language of the court upon this subject has already been quoted, and need not be repeated here. But it is important to note that the court had before it, in the argument of Attorney General Culberson (154 U. S., pp. 370-378), practically all the considerations which are presented by the argument on behalf of petitioner in the case at bar; indeed, we think that the Attorney General of Minnesota has not yet been able to suggest any point of importance that was not fully presented by Attorney General Culberson in the Reagan

case, except that petitioner has such advantage as lies in the supposed authority of Fitts v. McGhee.

In two particulars the facts of the Reagan case are claimed to differ from this. In one section it was provided that a party dissatisfied with an order of the Commission might bring suit to test the validity of the same "in a court of competent jurisdiction in Travis County, Texas, *against said Commission as defendant.*" The court suggests that this provision might be construed as consenting that the orders of the Commission might be tested in the Federal court sitting in Travis County, at least in a suit against the Railroad Commission alone; and in one or two subsequent cases it has been intimated that the decision of the Reagan case, with respect to the application of the Eleventh Amendment, should be referred to that ground. But it is plain that the court itself did *not* at that time rest its decision upon that ground; for after discussing the proposition the court says, on p. 392:

> "However, it is unnecessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the State."

But it will be noted that the provision of the Texas statute authorizing suit is confined to suit *against the Railroad Commission alone.* There is nothing whatever in the statute which could be construed to authorize a suit against the Attorney General as such. Hence the point referred to can have no application to the present case.

In another section of the Texas act it seems to be provided that it shall be the duty of the Attorney General to institute suits in the name of the State for the recovery of the penalties prescribed by the act. And this is the basis upon which it is attempted to distinguish the Reagan case and Smyth v. Ames. The supposed distinction is thus expressed in Fitts v. McGhee (p. 529):

> "The defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass, to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

The remarks quoted refer to the Reagan case, to Smyth v. Ames, 169 U. S. 466, and also to Poindexter v. Greenhow, Allen v. Baltimore & Ohio, Pennoyer v. McConnaughy and Scott v. Donald, previously cited. The facts of the four latter cases may furnish a basis for such a distinction; but we submit that as respects the Reagan case and Smyth v. Ames this is not so.

Passing for the moment the question whether a valid distinction can be founded upon the fact that the statute considered in the Reagan case contained a provision to the effect that the penalties therein prescribed should be recovered in suits instituted by the Attorney General in the name of the State; we desire to point out that in that case the only "specific wrong or trespass, to the injury of the plaintiff's rights," and the only "positive act" which the Attorney General of Texas "under sanction of an unconstitutional statute" was charged with threatening or intending—and the only prohibition of the injunction against him— was the instituting of suits and actions in the courts of that state against the defendant Railroad Company for the recovery of penalties prescribed by the act. It is submitted that there is no possible difference in this respect between the Reagan case and the case at bar.

And in Smyth v. Ames, notwithstanding the reference thereto contained in the foregoing quotation from the opinion in Fitts v. McGhee, there is no such a provision as that which appears in the statute in the Reagan case, making it the duty of the Attorney General to prosecute actions for the recovery of penalties. The abstract of the Nebraska statute which is found in the report of Smyth v. Ames (169 U. S., pp. 470-476) may be searched in vain for any provision charging the Attorney General with any duty with respect to the recovery of the penalties prescribed in the act. Those penalties, indeed, are unlike the penalties imposed by

the Texas statute, which were to be recovered in a civil suit prosecuted by the Attorney General in the name of the State (as are the penalties prescribed by Section 1987 of the Revised Laws of Minnesota, 1905) and more nearly resemble the penalties created by the Minnesota legislation of 1907. The Nebraska statute (p. 476) provides that if a common carrier shall violate any provision of the act it

> "shall, *upon conviction thereof, be fined* in any sum not less than $1,000 nor more than $5,000 for the first offence; and for the second offence not less than $5,000 nor more than $10,000; and for the third offence not less than $10,000 nor more than $20,000; for every subsequent offense, *upon conviction thereof*, it shall be *liable to a fine* of $25,000."

We think the scope of the decision in Smyth v. Ames has been somewhat misunderstood. In Fitts v. McGhee, that case is put in the same category as Pennoyer v. McConnaughy, Poindexter v. Greenhow, In re Tyler, Scott v. Donald and Reagan v. Farmers Loan & Trust Co., as a case in which jurisdiction was sustained, notwithstanding the Eleventh Amendment, because the state officials who were made defendants were "specially charged" with the enforcement of the law. That may possibly have been true of the members of the Nebraska Board of Transportation, of whom the Attorney General, ex officio, was one. But it is *not* true as applied to that defendant, in so far as he was sued and enjoined in his capacity as Attorney General of the State. It was said, indeed, in Prout v. Starr, 188 U. S. 537, 544:

> "It is true that the defendant was included in the bill as Attorney General of the State, but that

was because he was one of the Board of Transportation, which was directed to enforce the provisions of the act."

But that remark must be read in the light of the circumstances under which it was made and of the language used in connection with it. The issue in Prout v. Starr had already been decided, as we think, upon the broad ground that the decision in Smyth v. Ames holding the Attorney General subject to suit was correct, under the reasoning that no construction of the Eleventh Amendment should be adopted which would destroy the efficacy of the protecting clauses of the Fourteenth Amendment. Then taking up and disposing of an argument made by the Attorney General, the court said further:

"It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as Attorney General of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the Attorney General of a State cannot be restrained by an injunction of a United States court from *enforcing the criminal laws of the State.* This, we think, is only another phase of the same question. It is true that the defendant was included in the bill as the Attorney General of the State, but that was because he was one of the Board of Transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the Attorney General in prosecuting offenders against the *valid criminal laws* of the State, but its object was *to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void.* The injunction must be so read and understood."

The statement in Prout v. Starr to the effect that in the Ames case the Attorney General was joined, not in his official capacity as Attorney General, but because he was a member of the Board of Transportation, was unnecessary to the conclusion there reached, and was made inadvertently, as we think. It is true that the individual who occupied the office of Attorney General of Nebraska at the time that suit was commenced, was also by virtue of his incumbency of that office a member of the Board of Transportation of the State. And it may be conceded that as a member of such Board of Transportation he was a person "specially charged" with the administration of the law; although a careful reading of the Nebraska statute fails to disclose any provision which expressly imposes upon the Board of Transportation any duty to take any action to enforce the provisions of the act. But while this individual defendant was sued and was enjoined as a member of the Board of Transportation, he was also sued and enjoined in an entirely distinct and different capacity, viz: that of Attorney General of the state. We cannot see that the situation is in any degree different from what it would have been had the two offices been held by different individuals.

And in Smyth v. Ames the decree which was affirmed, after providing "that the Board of Transportation of said State and the members and secretaries of said Board" be perpetually enjoined and restrained from taking any action for enforcement of the legislation,

proceeded (without designating the defendant by name) as follows:

> "That *the Attorney General of this State* be in like manner enjoined from bringing, aiding in bringing or causing to be brought any proceeding by way of *injunction, mandamus, civil action or indictment* against said companies or either of them, or their receivers, for or on account of any action or omission on their part commanded or forbidden by the said act."

It is to that injunction, resting upon that state of facts, that the following language of the opinion in Smyth v. Ames applies:

> "The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction consistently with the Eleventh Amendment to the Constitution of the United States. * * * But to prevent misapprehension, we add that, within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals *for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff*, is not a suit against the State within the meaning of that Amendment. Pennoyer v. McConnaughy, 140 U. S. 1, 10; In re Tyler, 149 U. S. 164, 190; Scott v. Donald, 165 U. S. 58, 68; Tindal v. Wesley, 167 U. S. 204, 220."

This language must be read in the light of the facts to which it applies. So read, we submit that there is no possible ground for distinction, in any view, be-

tween Smyth v. Ames and the case at bar. And we confidently believe that no decision can be rendered in favor of petitioner in this proceeding without overruling Smyth v. Ames.

But Smyth v. Ames cannot be overruled unless a number of subsequent decisions of this court are also overruled. For the Ames case was reaffirmed on the point under consideration, in express terms and with complete approval, in Prout v. Starr and in Gunter v. Atlantic Coast Line, 200 U. S. 273, 284. The language last above recited was quoted at length, with full approval, in Prout v. Starr and again in the Gunter case. In Prout v. Starr Mr. Justice Shiras said:

> "But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the State of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States. It is a sufficient answer to this contention that it was made, considered and determined in Smyth v. Ames. In the opinion in that case it was said: 'Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment. Pennoyer v. McCon-

naughy, 140 U. S. 1; In re Tyler, 149 U. S. 164, 190; Scott v Donald, 165 U. S. 58, 68; Tindal v. Wesley, 167 U. S. 204, 220.'"

And in Gunter v. Atlantic Coast Line Mr. Justice White said:

> "A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment. The doctrine announced many previous cases on the subject was stated by Mr. Justice Harlan, delivering the opinion of the court in Smyth v. Ames, 169 U. S. 466, wherein, after holding that a suit against officers to prevent the doing of acts authorized by a state statute was not necessarily a suit against the State, or within the prohibitions of the Eleventh Amendment, it was said: 'It is the well settled doctrine of this court that a suit against individuals far the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment.' And the subject was *reviewed and restated in Prout v. Starr*, 188 U. S. 537."

Prout v. Starr was decided in 1903, some four years after the decision of Fitts v. McGhee. It appears that Attorney General Prout relied mainly upon the supposed authority of Fitts v. McGhee, and it is evident that that case was given full consideration. Nevertheless the court reaffirmed its decision in Smyth v. Ames, without the slightest hint or suggestion that that decision was in any respect erroneous as an original proposition.

And in Mississippi Railroad Commission v. Illinois Central, 203 U. S. 335, 340, the Reagan case, Smyth v.

Ames and Prout v. Starr are referred to, as decisions of present and continuing authority, in support of a similar conclusion.

It may be that the cases of Gunter v. Atlantic Coast Line and Mississippi Railroad Commission v. Illinois Central are distinguishable upon their special facts; but a recognition of the correctness of the decisions in the Reagan case and Smyth v. Ames, was essential to the conclusion reached in each case; and it cannot be claimed that the approval of the doctrine of the two earlier cases was not deliberate and authoritative.

Petitioner's argument amounts to the claim that in Fitts v. McGhee this court intended to depart from the principles which had controlled the decision of the numerous cases involving the construction and application of the Eleventh Amendment, and which it had consistently adhered to from the early case of Osborn v. United States Bank, decided in 1824, down to and including the case of Smyth v. Ames, decided only ten months earlier than Fitts v. McGhee. But if so, this court must be deemed to have returned, in Prout v. Starr, to its original position. And its subsequent decisions have been consistent with that position, and, as we believe, wholly inconsistent with that construction of Fitts v. McGhee which is necessary to support the claims of the present petitioner.

For the Reagan case, Smyth v. Ames, Prout v. Starr, Gunter v. Atlantic Coast Line, Missis-

sippi Railroad Commission v. Illinois Central, and McNeill v. Southern Railway Company, 202 U. S. 543, are entirely consistent with each other and with every other case in which this court has dealt with the Eleventh Amendment—with the possible exception of Fitts v. McGhee. And the cases last above referred to, and especially the Reagan case, Smyth v. Ames, and Prout v. Starr, are, in our judgment, absolutely irreconcilable with that view of Fitts v. McGhee which would make it authority against the injunction here in question.

It has been suggested that Prout v. Starr is not to be considered as reaffirming the doctrine of Smyth v. Ames, upon the theory that in Prout v. Starr it was merely held that the decision in the Ames case was *res judicata* in the Starr case, under the stipulation there made that the decree in the Starr case should follow the decree in the Ames case; consequently, that the only thing determined in Prout v. Starr was that by ancillary and supplementary proceedings the Attorney General may be restrained from conduct violative of a decree by which he must be held bound under the doctrine of *res judicata*. But this cannot be so. It may be that the court *might* have disposed of Prout v. Starr upon the ground indicated—that is, it might have held that the construction of the Eleventh Amendment applied by the court in Smyth v. Ames was incorrect, but that the decision in the Ames case must be deemed *res judicata* in the Starr case. *But it did not!* It held squarely that the decision in the Ames case was right,

and put its decision against Prout upon that ground. And in each of the subsequent cases of Gunter v. Atlantic Coast Line and Mississippi Railroad Commission v. Illinois Central, the continuing authority of the Ames case is again recognized.

Nor can it successfully be claimed that this reaffirmation, in Prout v. Starr, of the rule of Smyth v. Ames may be regarded as *obiter,* for the reason that the decision *might* have been put upon another ground. On this point we refer again to the rule announced in Union Pacific Ry. Co. v. Mason City & Fort Dodge Railroad Co., 199 U. S. 160, 166, to the effect that where there are two grounds upon either of which the judgment of the court can be rested, and the court decides both, "the ruling in neither is *obiter,* but each is the judgment of the court and of equal validity with the other."

The latest cases in which the doctrine of Smyth v. Ames, has been reaffirmed and applied are McNeill v. Southern Ry. Co. and Mississippi Railroad Commission v. Illinois Central, cited above. Neither of these cases involved a suit against the Attorney General as such, and petitioner attempts to distinguish them upon the same basis of distinction which is suggested in Fitts v. McGhee, viz. that the members of a state railroad commission are officers "specially charged with the execution and enforcement of the law." Such a distinction may have been sound as applied to the peculiar facts before the court in Fitts v. McGhee; but if applied to the situation in the case at bar, we think the distinc-

tion is artificial and unsound and rests upon mere technicality.

If the statute construed in Smyth v. Ames, is carefully studied it will be found that it differs in no substantial respect from the Minnesota statute here in question. Nowhere in the Nebraska statute is there any provision which expressly casts upon the Board of Transportation the duty of executing or enforcing the law. In Sections 5 and 6 of the Nebraska act the Board of Transportation is authorized, upon a proper showing, to permit an increase or to require a reduction in the rates specified in the act itself; but precisely the same authority and duty is granted and imposed by Section 5 of the Minnesota act of April 18th, 1907. It is true that the Minnesota act contains a declaration that no duty shall rest upon the Commission to enforce the rates prescribed by the act; but the same result flows from the fact that the Nebraska act is silent upon the subject. A state railroad commission is entirely the creature of statute, and the absence of any provision imposing upon it the duty to execute or enforce the law is equivalent to an express declaration that no such duty shall rest upon it.

However, let us concede that each law imposes upon the members of the state railroad commission the duty of enforcing the rates established by state authority. Wherein, we ask, is there any essential difference, as respects a suit for injunction against enforcement of unconstitutional rate regulations, between a member of a state commission and the individual occupying the office of Attorney General, whose duty it is, whether

under express statute or by virtue of the powers and duties inherent in his office, to enforce those regulations? In either case the interest of the public and of the state, as such, is the same. In either case the legislation of the state is set aside and its operation restrained by the processes of the Federal court. In either case the railroad company is judicially relieved from obligation to obey the law; and this is done in a proceeding to which the representatives of the state are parties. What reason is there why one official representative of the state's authority should be subject to suit and injunction, and the other not?

It cannot be because the duties of one are discretionary and those of the other merely ministerial. It may be that the office of Attorney General is higher in rank than that of a member of a Railroad Commission. But if so, it is not because he is vested with greater or more important discretion, or because his duties are less ministerial in character. As a matter of fact, there is no higher discretion delegated to any state official in these days than the discretion exercised by the Railroad Commission of a state; nor any higher or more important powers wielded by any state officer. We venture to say that the duties of the Railroad Commission are no more often ministerial in character than those of the Attorney General. Not in all respects is the Attorney General vested with "uncontrolled discretion"—to quote a phrase which petitioner has repeatedly used in his argument. In some respects he is subject to the orders of the Commission, and he is left with no discretion as to whether its orders shall be obeyed. For Section 1960 of the Revised Laws of Minnesota, 1905, pro-

vides as follows:

> "The Attorney General shall be, ex officio, attorney for the Commission. He *shall* institute and prosecute *all* actions which the Commission shall *order* brought, and shall render the commissioners all advice, counsel and assistance necessary for the proper performance of their duties. * * *"

The general powers and duties inherent in the office of the Attorney General of Minnesota include the power and duty to prosecute offenders against the laws of the state. The fact that in some cases such power and duty is also vested in the County Attorney of a given county does not take away from the powers and duties of the Attorney General. See Young v. Robinson (Minn.) 112 N. W. Rep. 269. It is, therefore, the duty of the Attorney General (and in a broad sense he is charged by law with such duty) to institute prosecutions for violation of such statutes as the act of April 18th, 1907.

Aside from this, a special duty is imposed on the Attorney General by Section 58 of the Revised Laws of 1905, which is identical with Section 3, Chapter 227, General Laws of Minnesota, 1905, and which provides:

> "* * * Whenever *any corporation* shall have offended against the laws of the state, or misused, surrendered, abandoned or forfeited its corporate authority, or any of its franchises or privileges, *he shall cause proceedings to be instituted against it.*"

If the statute just quoted is not effective to charge the Attorney General with the duty of enforcing, against a railroad corporation, as such, the provisions of laws like the act of April 18th, 1907, it at least imposes upon him, in a general way, the positive duty to proceed against any railroad company violating the provisions of

that act for the enforcement of the penalties imposed upon the railroad company, as a corporation, by the terms of the act.

Another thought is suggested by that provision of the statutes of Minnesota which reads as follows:

> "The Attorney General shall be, ex officio, attorney for the Commission. He shall institute and prosecute all actions which the Commission shall order brought, and shall render the commissioners all advice, counsel and assistance necessary for the proper performance of their duties."

It has been argued that the language in Prout v. Starr to the effect that the Attorney General of Nebraska was properly made a party to and bound by the injunction affirmed in the Ames case solely because, as a member of the Board of Transportation, he was subject to suit, notwithstanding the Eleventh Amendment; and that, being properly made a party for one purpose, he could be held as a party for all purposes—so that the injunction against him in his capacity as Attorney General, restraining him from exercising his powers as Attorney General, was justified by the mere fact that he was properly made party to the suit in another capacity. That, we think, is the construction of Prout v. Starr most favorable to petitioner.

But suppose that theory be applied to the present case. Under the statute quoted above, petitioner, as law officer of the Commission and absolutely bound to

execute its directions for the enforcement of any order or regulation which it might make, was a proper party to the suit, in any view of the Eleventh Amendment consistent with the idea that the members of the Railroad Commission are not exempt from suit thereunder (and this petitioner does not dispute) for the reason that one of the chief objects of the suit was to restrain the enforcement of the Commission's order of September 6th, 1906, establishing a schedule of maximum rates for the so-called "classified" freights. Under the theory upon which petitioner's argument proceeds, and which is suggested by the language of the court in Fitts v. McGhee, not only the Commission itself, but also the Attorney General, under the statute last referred to, was "specially charged by law with the execution and enforcement" of the order establishing these rates. Petitioner was, therefore, properly made a party to the suit; and under the construction of Prout v. Starr suggested above he cannot be heard to complain, in a proceeding for writ of habeas corpus, which is in the nature of a collateral attack upon the jurisdiction of the court, that the injunction was too broad.

On the second proposition decided in Fitts v. McGhee, viz. that the Federal court, sitting in equity, is without jurisdiction to enjoin criminal prosecutions in the State court, the only authorities cited in the opinion are In re Sawyer, 124 U. S. 200, and Harkrader v. Wadley, 172 U. S. 148. Nor does petitioner's preliminary brief refer to any other authorities on this point.

Neither the Sawyer case nor Hardrader v. Wadley sustain the proposition to which they were cited, in any construction which would make it applicable to the facts of the case at bar. In the Sawyer case the sole question was whether a court of equity had jurisdiction to restrain the governing body of a municipality from proceeding to remove an officer of that municipality for malfeasance in office. The question for solution was not one of *Federal* jurisdiction, but of *equity* jurisdiction. All the reasoning of the opinion proceeds upon the basis that if a state court, sitting in equity, would have jurisdiction to grant the relief prayed, the Federal court would have the same jurisdiction, and the application of the Eleventh Amendment is not considered in the Sawyer case at all. The conclusion reached, and the grounds for it, are sufficiently shown by the following extracts fom the opinion of Mr. Justice Gray; some of which language, but not all, was quoted by Mr. Justice Harlan in Fitts v. McGhee:

> "Under the constitution and laws of the United States the distinction between common law and equity as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. (Citing cases.) The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the *protection of rights of property.* It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law,

or of the executive and administrative department of the government. * * * The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.* * * * It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers. * * * The jurisdiction to determine the title to a public office belongs exclusively to the courts of law. * * * The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order for the disregard of which they are in custody, is to prevent his removal from the office of police judge. *No question of property is suggested in the allegations of the matters of fact in the bill, or would be involved in any decree that the court could make thereon.*"

Nor is Harkrader v. Wadley any more nearly in point. On the contrary, when that case is carefully studied, it will be found authority *against* the conclusions which petitioner seeks to draw from the reasoning of Fitts v. McGhee. Some language is found therein, in connection with a reference to the Ayers case, in which petitioner may find some comfort. But this should be considered in the light of the facts with reference to which it is used.

"We come now to the question thus solely presented for our consideration. Had the Circuit Court of the United States authority to issue a writ of habeaus corpus to take and discharge a prisoner from the custody of the state court *when proceeding under a state statute not repugnant to the Constitution or laws of the United States,* under which the prisoner had been indicted for an offence

against the laws of the State? * * * When a state court has entered upon the trial of a criminal case, *under a statute not repugnant to the Constitution of the United States*, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of habeas corpus. * * * In the present case *it is not contended that the state statute*, under which the County court of Wythe County was proceeding, *was repugnant to the Constitution or any law of the United States.* (The foregoing italics are ours.) * * * In re Sawyer, 124 U. S. 200, is cited, where Mr. Justice Gray said: 'Modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*' (These latter italics are those of the opinion itself.) * * * It is sufficient to say that in the present case the indictment whose prosecution the Circuit Court sought to stay, appears to have been regularly found, and to assert an offence against a law of the State, *the validity of which is not assailed.*" (These italics are ours.)

And it was not long after the decision of Fitts v. McGhee was written, before this court made definite departure from the rule therein laid down with respect to the right of a court of equity to restrain prosecutions under invalid legislation violative of private rights. In Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, Mr. Justice Brown said:

"That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, *or to prohibit the invasion of the rights of*

property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, In re Sawyer, 124 U. S. 200, that no further reference to prior authorities is deemed necessary. * * * The general rule that a Circuit Court of the United States, sitting as a court of equity, cannot stay by injunction, proceedings pending in a state court to enforce the criminal laws of such State, was applied in Harkrader v. Wadley, 172 U. S. 148, to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in Fitts v. McGhee, 172 U. S. 516, to a suit brought by the receiver of a railroad against the attorney general of the State to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the provisions of a state law reducing the tolls which had been exacted of the public by the railroad of which the plaintiff was receiver. This was held to be in reality a suit against the State to enjoin the institution of criminal proceedings, and hence within the general rule. See also Prout v. Starr, 188 U. S. 537. Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property *by the enforcement of an unconstitutional law*, where such enforcement would result in irreparable damages to the plaintiff. * * * It would seem that, if there were jurisdiction in a court of equity *to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceedings.* Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558."

We think that although in the Davis & Farnum case the court did not in terms overrule or criticise Fitts v. McGhee, it expressed very clearly a view of the law quite contrary to that construction of that case upon which petitioner here relies.

But petitioner may claim that the remarks quoted from the Davis & Farnum case are no more than the *dictum* of the court. If so, it was left for the decision in Dobbins v. Los Angeles, 195 U. S. 223, 241, to settle the matter in an authoritative way. And that case sets the question forever at rest. It was there held, upon a point essential to the decision:

> "It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, and cases therein cited."

(B.)

Fitts v. McGhee is distinguishable from and ought not to control the present case.

The points to be made under this head have already been suggested and discussed in the course of the argument of the last preceding proposition, and we feel hardly justified, in view of the length of this brief, in restating those arguments here, especially as we understand that the grounds for distinction will be quite fully argued in one of the other briefs which will be presented on behalf of respondent.

Among the points which may be made under this head, and which have already been presented in another form, is the proposition that the Attorney General of Minnesota is a person charged by law with the duty of executing and enforcing the statute complained of, within the meaning of the distinction made in Fitts v. McGhee, between that case and cases like Reagan v.

Farmers Loan & Trust Co., Smyth v. Ames, and the other authorities cited on page 529 of that opinion.

Another point of distinction is that the Minnesota suits were commenced, so that the Federal court acquired jurisdiction over the whole controversy, before any prosecutions under the penalty clauses of the legislation in question had been instituted; thus bringing the cases within the rule of the Sawyer case, Harkrader v. Wadley, and the two Los Angeles cases.

Another point is that in each of the Minnesota suits the principal defendant was the railroad company itself, and the principal relief sought was an injunction to prevent the railroad company from putting the rates into effect; the restraint of the Attorney General and the Railroad and Warehouse Commission being merely incidental and ancillary to the main injunction, and being chiefly aimed at preventing interference with or harrassment of the railroad company by prosecutions founded upon its obedience to that injunction. It may be that the state officials were the real adversary parties to the proceeding, but that does not alter the nature of the suit as considered from the standpoint of the jurisdiction of a court of equity. In Fitts v. McGhee the action was originally begun against the State, as defendant *co nomine*, and against the Governor and Attorney General of that state, for the express and sole purpose of having the statute declared unconstitutional and its execution restrained. Subsequently the suit was dismissed as to the State and the Governor, but was continued as to the Attorney General and other parties afterwards brought in as defendants. We think the

manner in which that case was framed up and presented had much to do with the disposition made of it in this court.

(C.)

That if the doctrine of Fitts v. McGhee can be held applicable to the present case, then that decision is unsound in principle and ought to be overruled upon the ground that the Eleventh Amendment should not be given a construction which would tend to impair the full efficacy of the protecting clauses of the Fourteenth Amendment.

We regard the question suggested in the foregoing head-note as decidedly the most important one involved in the present controversy. Indeed, the far-reaching importance of that question can hardly be overestimated; especially in view of the tendency which has been so marked in certain recent legislation, of which no more vicious example could be given than that disclosed by the acts of the legislature of Minnesota now before this court.

It has become the aim of some legislatures to frame their enactments with such cunning adroitness, and to hedge them about with such savage and drastic penalties, as to make it impossible to test the validity of such statutes in the courts save at a risk no prudent man would dare to assume. An apt comment upon this tendency, and upon the character of such legislation, appears in the opinion by Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Company, 183 U. S. 79, 99-102. And practically every succeeding legislature which has been conven-

ed since that opinion was written has outdone its predecessors in devising penalties aimed, as were the penalties considered in the Cotting case, not at enforcing obedience to a valid law or regulation, but at compelling immediate submission to statutes of doubtful validity, without opportunity to test the validity thereof in the courts except at a risk so intimidating as to be prohibitory.

There is but one effective protection against such legislation—the power that may be exercised by courts of equity, and especially by the Circuit Courts of the United States. If it shall be held that a state statute may be so adroitly framed that the Eleventh Amendment will bar any suit in the Federal courts of equity jurisdiction, then no corporation nor individual will dare assume the risk of the savage punishments which may be inflicted under such acts, and legislation which flagrantly violates the provisions of the Fourteenth Amendment will be made operative for all practical purposes.

In cases like the present the question whether the rates and regulations imposed upon a railroad deprive it of its property without due process of law, or deny to it the equal protection of the laws, contrary to the Fourteenth Amendment, generally depends upon whether or not the rates are sufficient to yield to the railroad a fair compensation for the service rendered. And under the decisions of this court, that issue rests upon the most involved and intricate question of fact which a court is ever called upon to consider. Under the rule of Fitts v. McGhee, as construed by our op-

ponents, the railroad company and its employes, officers and stockholders have no standing in a court of equity. The rates and regulations imposed must be submitted to and obeyed, no matter how confiscatory and destructive they may prove to be, or else the railroad is subjected to penalties which, in one day's business, would wipe out the entire value of its property, and every officer and employe is liable to arrest and imprisonment. A thousand or more separate actions and prosecutions might be the result of a single day's business. And in each action and prosecution the only available defense would be that the rates or regulations were confiscatory in fact and, therefore, void under the Fourteenth Amendment. And that defense would be a separate issue, to be separately tried and determined, in each such proceeding. We know of no law which would make an adjudication in one such case conclusive upon the court and prosecuting officers in another case against a different defendant. And what machinery has a police court for determining such questions?

The truth is, as will be apparent upon reflection, that if questions of this sort cannot be dealt with by courts of equity, in suits like those now pending in the court below, and if it is beyond the power of such a court to restrain prosecutions under an act found to violate the Constitution of the United States, then nothing remains for any corporation which is made the victim of such legislation but to submit thereto, and endure as philosophically as may be the injury—nay, even the ruin—which that legislation inflicts.

But while we regard this question as the most important question presented by this petition, we understand that it will be argued at considerable length in another brief to be presented on this hearing. And our own brief is already so long that we feel constrained to dismiss the subject, and to close our argument, with the following quotation from the language of Mr. Justice Shiras in Prout v. Starr:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. *Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments.* * * * It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union

that each and all of them shall be respected and observed."

Respectfully submitted,

FRANK B. KELLOGG,

CORDENIO A. SEVERANCE,

ROBERT E. OLDS,

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Of Counsel for Respondent.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG,
PETITIONER.

BRIEF FOR WILLIAM L. GRIMSHAW, UNITED STATES MARSHAL,
Respondent.

JARED HOW,
PIERCE BUTLER,
WILLIAM D. MITCHELL,
Solicitors for Respondent.

McGill-Warner Co., Printers, St. Paul, Minn.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG,
PETITIONER.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT.

This hearing is had upon the return to an order made by this Court addressed to the United States Marshal for the District of Minnesota, and directing him to show cause why a writ of *habeas corpus* should not be granted as prayed in the petition of Edward T. Young. The petition was based upon the following facts:

May 29, 1907, Charles E. Perkins and David C. Shepard, stockholders in the Northern Pacific Railway Company, filed in the Circuit Court of the United States for the District of Minnesota, their bill of complaint against the Railway Company, Edward T. Young, Ira B. Mills, Charles F. Staples, William E. Young, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, as defendants. The bill set forth that the defendant railway company was a common car-

rier owning and operating lines of railway in Minnesota and other states; that defendant Edward T. Young was the Attorney General of the State of Minnesota; that the defendants Ira B. Mills, Charles F. Staples and William E. Young were the members of the Railroad and Warehouse Commission of the State of Minnesota; that the defendants Evarts, Whiteman, Reeve and Michauds were shippers engaged in shipping and receiving within the State freight shipped over the lines of said defendant railway company, and were representative of the numerous class of such shippers; that on the 6th day of September, 1906, and on the 3d day of May, 1907, respectively, the Railroad and Warehouse Commission of the State of Minnesota, assuming to act pursuant to statutory provisions of the State, had made and published two orders prescribing maximum rates to be charged by the defendant railway company for the carriage by it of merchandise between stations within the State; that the company had put into effect and still maintained the rates prescribed by the order of September 6, 1906, and threatened to put into effect the rates prescribed by the order of May 3, 1907, when it should by its terms become effective; that the legislature of the State of Minnesota had passed an act approved April 18, 1907, prescribing maximum rates to be charged by railway companies for the carriage by them of certain specified commodities, to-wit, wheat, coarse grain, live stock, lumber and coal, between stations within the State; that said act would by its terms become effective June 1, 1907, and that the defendant company threatened to put into effect the rates prescribed therein; that the legislature had passed an act approved April

4, 1907, prescribing maximum rates to be charged by railway companies for the carriage by them of passengers between stations within the State, and that the defendant company had put into effect and still maintained the rates prescribed by that act. The respective acts and orders were attached as exhibits to the bill. The maximum passenger rate prescribed by the act of April 4, 1907, is two cents per mile, and it was averred in the bill that the defendant company had theretofore been charging three cents per mile. Schedules attached to the bill as exhibits showed that the act of April 18, 1907, and the respective orders of the Commission reduced the rates charged by the defendant company existing prior thereto between 15 and 30 per cent.

The bill set forth that the rates prescribed by the Act of April 4, 1907, for passengers is confiscatory and will deprive the company of its property without due process of law, and, after setting forth certain facts upon which such statement may be predicated, that all of "said orders and said respective acts operate directly and necessarily upon interstate commerce, and are regulations of such commerce in violation of the exclusive power granted to Congress by the Constitution of the United States."

After averments in compliance with the 94th Equity Rule the complainants state that:

> "If the said railway company, its officers, directors, agents and employes shall cease obedience to the said order of the said Railroad and Warehouse Commission of September 6, 1906, or shall refuse obedience to said order of May 3, 1907, said Commission and said

Edward T. Young, as Attorney General of the State of Minnesota, in behalf of said Commission, will, as your orators are advised and believe, institute proceedings by mandamus or otherwise, against said railway company, its officers, directors, agents or employes, to enforce said orders and all the provisions thereof, and threaten to and will take other proceedings against said company, its officers, directors, agents and employes, to the same end and for the same purpose.

"If said railway company, its officers, directors, agents and employes shall fail or refuse to keep in force the tariffs prescribed by the said Act of April 4, 1907, or fail or refuse to put in force and effect the tariffs prescribed by said act of April 18, 1907, said defendant Edward T. Young, will, as your orators are advised and believe, institute mandamus or other proceedings for the purpose of enforcing said acts, and each thereof, and the provisions and penalties thereof."

And pray:

"That said acts of the legislature of the State of Minnesota, and each of them, and said orders of said Railroad and Warehouse Commission, and each of them, be declared to be in violation of the Constitution of the United States, and therefore void and of no effect, so far as the said Northern Pacific Railway Company, its officers, directors, agents and employes are concerned, and that said Northern Pacific Railway Company, its officers, directors, agents and employes, be temporarily and permanently enjoined and restrained from continuing to observe or keep in force the tariffs fixed by said order of September 6, 1906, or the passenger rate set forth and prescribed in said act of April 4, 1907, or from publishing or adopting the tariffs set forth in said act of April 18, 1907, or those set forth in said order of May 3, 1907, or from

reducing its tariffs to the figures set forth in said last named act or said last named order.

"That the said Edward T. Young, as Attorney General of the State of Minnesota, and Ira B. Mills, Charles F. Staples and William E. Young, as the Railroad and Warehouse Commission of the State of Minnesota, be temporarily and permanently restrained and enjoined from any attempt to compel said railway company to observe, publish, post or put in force said rates, or any of them, as fixed by said order of September 6, 1906, or said order of May 3, 1907, and further be temporarily and permanently restrained and enjoined from taking any action, step or proceeding against said railway company, or any of its officers, directors, agents or employes, to enforce any penalties or remedies for the violation by said railway company of said orders or either of them.

"That said Edward T. Young as Attorney General be temporarily and permanently enjoined and restrained, from taking any action, step or proceeding against said railway company, its officers, agents or employes, to enforce the penalties and remedies specified in said acts of April 4, 1907, and April 18, 1907, or either of them.

"And that the defendants E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, and other shippers affected by this proceeding, be temporarily and permanently enjoined and restrained from instituting any action for the violation of said orders or acts, or either of them, or from demanding that any of the rates contained therein, or either of them, be given to said shippers, or any of them; and that your orators may have such other and further relief as may be just and equitable."

Petition, pp. 7-33.

The bill has been amended in three particulars—first, by a perhaps unnecessarily more particular compliance with the 94th Equity Rule; second, by the addition of averments that the laws in question each denied the equal protection of the law as follows:

> "Your orators further allege that said acts of April 4, 1907, and April 18, 1907, and each of them, is, in the penalties prescribed for their violation, so drastic, that no owner or operator of railway property can invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employes, and for that reason your orators allege that said acts of April 4, 1907, and April 18, 1907, and each of said acts, denies to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprives it and them of their property without due process of law, and are, and each of said acts is, for that reason, unconstitutional and void."
>
> Petition, p. 62;

and third, upon the argument of the motion for a temporary injunction and upon the claim that it was in conformity with the proof then adduced, by the addition of averments that the rates prescribed by the respective orders complained of and the act of April 18, 1907, were, as well as those prescribed by the act of April 4, 1907, confiscatory, and in violation of the Fourteenth Amendment to the Constitution.

Petition, p. 92.

Upon the filing of the verified bill the Court issued its order to show cause why a temporary injunction should not issue in accordance with the prayer of the bill, and in the meantime restraining the railway company from adopting the rates prescribed by the act of April 18, 1907 (the only rates complained of [excepting those prescribed by the order of May 3, 1907, which are comparatively unimportant], which had not then been adopted by the company), and restraining the defendant Edward T. Young "from taking or causing to be taken any action, step or proceeding against said railway company, its officers, directors, agents or employes to enforce the penalties and remedies specified in said act approved April 18, 1907."

The defendant Edward T. Young entered a special appearance for the purpose only of the motions, and filed two motions—one to dismiss as to him the bill of complaint, and the other that the order to show cause be discharged—and both based on the claim that

> "It appears by the bill of complaint herein, that the same is exhibited by the complainants against this defendant as and only as the Attorney General of the State of Minnesota, and that the relief sought and prayed for therein, is the restraint of him, the said Edward T. Young, as Attorney General aforesaid, by Writ of Injunction from proceeding in his official capacity and not otherwise, and in the exercise of an executive discretion thereby vested in him, to commence the appropriate action or actions in the name of and on behalf of the said State of Minnesota, thereby restraining the State of Minnesota from proceeding by appropriate action or actions to enforce certain

of its laws or to test the validity of the said laws, the said suit being therefore, in truth and effect, a suit against the said State of Minnesota as a party defendant, commenced against it without its consent, contrary to the Eleventh Amendment of the Constitution of the United States."

Petition, pp. 46-7.

Upon argument of these motions and on July 16th, 1907, it was by the Court decided that the Attorney General was a proper party defendant, and ordered that "if upon a final hearing of the order to show cause why a temporary injunction should not issue as therein prayed for, it shall be determined that such injunction shall issue, the same shall include the defendant Edward T. Young."

Petition, pp. 58-60.

The defendant Edward T. Young thereupon interposed his demurrer to the bill. The demurrer was general and also on two special grounds—first, that the suit is in effect against the State of Minnesota, and second, that the bill is multifarious.

Petition, p. 65.

On the 3d of September, the demurrer and the motion for a temporary injunction, as supported by the proof adduced by complainants, came on for argument. Presentation of proofs and arguments were renewed from day to day, with the result that on the 20th of September the Court rendered its decision that the demurrer should be overruled, that the prescribed rates were all confiscatory and that the motion for a temporary injunction should be

granted so far as the act of April 18, 1907, was concerned.

Petition, pp. 116-126.

On the 23d of September an order was entered, which enjoined the defendant railroad company from adopting the rates specified by the act of April 18, enjoined the defendant shippers from demanding such rates or instituting any action against the company for failure to adopt them, and enjoined the defendant Edward T. Young as follows:

> "That the defendant Edward T. Young, as Attorney General of the State of Minnesota, be restrained and enjoined, pending the final hearing of this cause, and until the further order of this Court in the premises, from taking or instituting any action, step or proceeding to enforce the penalties and remedies specified in said act (of April 18, 1907), or either thereof, or to compel obedience to said act or compliance therewith or any part thereof."

Petition, p. 128.

On the next day the defendant Edward T. Young instituted in the District Court for the County of Ramsey, State of Minnesota, a mandamus action entitled "The State of Minnesota on the Relation of Edward T. Young, Attorney General, Plaintiff, vs. Northern Pacific Railway Company, Defendant," and caused to be issued out of that Court an alternative writ of mandamus directed to the Northern Pacific Railway Company and commanding it as follows:

> "Now, therefore, you the Northern Pacific Railway Company, the defendant above named, are hereby com-

manded immediately after the receipt of this writ, to adopt and publish a[illegible] keep for public inspection, as provided by law, as [illegible]he rates and charges to be made, demanded and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character and class named and specified in Chapter 232 of the Session Laws of the State of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said Chapter 232; and that you make and file with the Railroad and Warehouse Commission of the State of Minnesota copies of said schedules, rates, fares and charges, and that from and after the receipt of this writ by you, you receive, haul, and transport commodities of the kind, class and character specified and described in said Chapter 232 between stations in the State of Minnesota at and for the rates, fares and charges in said Chapter set forth; and that for the carrying of such freight, no higher or greater charge be asked, demanded or received by you; and that you in all respects comply with the provisions of said chapter 232 of the Session Laws of the State of Minnesota for the year 1907; or, in case of your failure so to do, you show cause for such failure, if any there be, before this Court at a special term thereof to be held in the Court House in the City of St. Paul, Ramsey County, Minnesota, on Saturday, the 5th day of October, A. D. 1907, at 10 o'clock in the fornenoon of such day, and that you then and there make return to this writ with your certificate on such return as having done as you are commanded."

Petition, pp. 138-140.

These facts were made to appear to the Judge of the United States Court who made the order for an injunction

under date September 23d, and he issued an order to the defendant Edward T. Young to show cause why he should not be punished as for contempt.

Petition, pp. 130-131.

Upon the return of the order the respondent interposed an answer assuming to justify his action on the ground that he filed the petition for a writ of mandamus not as an individual, but as the Attorney General of the State; that he believed that the Court had no jurisdiction to enjoin him; and that he believed it to be his duty as such Attorney General to commence the mandamus proceeding.

Petition, pp. 132-134.

The court thereupon adjudged him in contempt, ordered him to dismiss the mandamus proceeding and to pay a fine of $100.00, and committed him to the custody of the Marshal of the District of Minnesota until he should comply with the order.

Petition, pp. 142-3.

Forthwith the defendant Edward T. Young filed in this Court his petition for a writ of *habeas corpus*. An order was issued by this Court to the Marshal of the District of Minnesota directing him to show cause why such writ should not issue: and it is upon the return to that order that this argumen is made.

ARGUMENT.

Apparently there are no inharmonious views of counsel as to what questions will be considered by the Court on this hearing. This Court has said in *In re Swan,* 150 U. S. at p. 648:

> "We reiterate what has so often been said before that the writ of *habeas corpus* cannot be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the Circuit Court which had no jurisdiction of the person or of the subject matter or authority to render the judgment complained of, then relief may be accorded."

We are assured that counsel for petitioner believe, as we believe, that there is no reason for contention that the Circuit Court did not have authority to adjudge the petitioner in contempt if it had jurisdiction over the subject matter of the suit and over the person of the defendant Edward T. Young, in the case of *Perkins v. Northern Pacific Railway Company;* and that the only questions which will be considered by the Court at this time are those as to such jurisdiction.

The argument of the petitioner is divided into two main parts. It is contended first that the Circuit Court had no jurisdiction over the subject matter of the action because the bill does not contain matters of which a Circuit Court may take cognizance; second, that the Circuit Court had no jurisdiction over the person of the petitioner because he was sued in his official capacity as Attorney General of

the State of Minnesota, and the suit against him was in effect a suit against the State in violation of the Eleventh Amendment.

I.

AS TO THE CONTENTION THAT THE CIRCUIT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION BECAUSE THE BILL DOES NOT CONTAIN MATTERS OF WHICH A CIRCUIT COURT MAY TAKE COGNIZANCE.

The complainants in the suit of *Perkins v. Northern Pacific Railway Company* make no claim to the jurisdiction of the Circuit Court on the ground of diverse citizenship. Their only claim is based on the provision of the Judiciary Act of 1887-1888, giving jurisdiction on the ground that the suit is a suit of a civil nature arising under the Constitution or laws of the United States. Counsel for petitioner urge that the suit in the Circuit Court is not a suit arising under the Constitution or laws of the United States for that the "only real controversy presented" was as to whether the rates prescribed are confiscatory, and therefore violative of the Fourteenth Amendment; that "this was a single question of fact;" that the scope and meaning of the provision in the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty or property without due process of law," have been finally settled beyond controversy; that this suit does not call for any new construction of that provision. They cite many cases in supposed support of this contention, the leading one of which is *Gold Washing Co. v. Keyes*, 96 U. S. 199, 203. The doctrine of that case is that

> "A cause cannot be removed from a state court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. * * * * * * Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction it must in some form appear upon the record by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy, as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

This we think to be a fair statement of the law as it stands. We submit that the suit in question comes well within the rule upon the claim of complainants that the prescribed rates are confiscatory, and that the orders and acts prescribing them are violative of the Fourteenth Amendment, if that claim alone be considered, and as well upon the claim of complainants that each of the acts in question deprives the defendant company and its stockholders of the equal protection of the laws, if that alone be considered.

City Ry. Co. v. Citizens' Street R. Co., 166 U. S. 557.
Illinois Central R. Co. v. Adams, 180 U. S. 28.

But this bill in the suit below presents another ground of Federal jurisdiction which is well within the narrowest

construction which may be given by counsel for the petitioner to the act of 1887-1888. The bill alleges that the principal business of the defendant railway company is interstate commerce; that upon its lines of road is a large grain field comprising the western portion of the State of Minnesota, the State of North Dakota, and the eastern portion of the State of Montana; that all the grain from this field moves to the head of Lake Superior (Duluth or Superior) or to Minneapolis; that between the eastern termini of said company and Montana the coal shipped by said company comes substantially entirely from the head of Lake Superior and is delivered at all stations upon the lines of said company through Minnesota and North Dakota; that the conditions attending the transportation of wheat are substantially the same whether the wheat is shipped from North Dakota stations or from Minnesota stations; that the conditions attending the transportation of coal are substantially the same whether the coal is shipped to North Dakota stations or to Minnesota stations; that the conditions attending the transportation of merchandise are the same in the States of Wisconsin, Minnesota, and North Dakota, and the merchandise shipped on said company's lines is shipped from the same points of origin; that the conditions attending the transportation of passengers are the same in all such states and for the most part whether it be local or interstate; that it is the duty of said railway company, to serve all the localities above mentioned, and all the communities therein, without discrimination.

"Therefore, in view of its legal obligation not to discriminate it has always been the practice of said railway company to make its tariffs on merchandise, on grain and other products of the soil, on live stock and on lumber in the territory above referred to, and, for many years, its rates for passenger transportation, upon a uniform principle or basis, disregarding state lines. Its respective rates on merchandise, on grain and similar products, on coal, on live stock and on lumber, and during many years for passengers, are and have been the same for similar distances upon local shipments within either Wisconsin, Minnesota, or North Dakota, and upon interstate shipments within that territory.

"Considering the conditions above described, it is and has been utterly impossible to apply in either of said states a materially different plan, system or scale of tariffs upon passengers or upon merchandise or said commodities or a materially lower plan, system or scale of such tariffs upon local shipments within any of said states from those applied upon interstate shipments.

"As applied to said railway company, having regard to the conditions above described, said orders and said respective acts operate directly and necessarily upon interstate commerce, and are regulations of such commerce in violation of the exclusive power granted to congress by the Constitution of the United States."

Petition, pp. 11-12.

Duluth and Superior are situated side by side on Lake Superior, the one in the State of Minnesota, and the other in the State of Wisconsin. They, with St. Paul and Minneapolis, are the eastern termini of the defendant com-

pany. They receive by water quantities of merchandise and distribute it through Minnesota. The rates prescribed by the respective orders and acts from Duluth to points in Minnesota are much lower than the company's existing interstate rates from Superior to points in Minnesota.

Moorhead is 249 miles westwardly from St. Paul and on the westwardly border of Minnesota. Fargo is one mile beyond and on the easterly border of North Dakota. The bill sets forth that prior to the taking effect of the act of April 4, 1907, the defendant company was charging three cents per mile for the transportation of a passenger,—state or interstate. The act prescribes a maximum rate for state transportation of two cents per mile. Attached to the bill are exhibits showing the rates charged by the company prior to the promulgation of the order of September 6, 1906, and the act of April 18, 1907, as compared with rates prescribed by that order and that act respectively. It may be discerned from these exhibits that the maximum rate prescribed by the act of April 18, 1907, for a car load of coarse grain from Moorhead to Duluth is 8.9 cents per cwt., while the established interstate rate of the company from Fargo to Duluth is 11 cents per cwt., being 23% higher than the state-made rate from Moorhead to Duluth; that the maximum rate prescribed by the act for a car load of soft coal from Duluth to Moorhead is $1.34 per ton, while the established interstate rate of the company from Duluth to Fargo is $2.00 per ton, being 50% higher than the state-made rate from Duluth to Moorhead. At the time of the taking effect of the passenger rate act of April 4, 1907, the company was charging $7.20 for the transportation of a passenger from Minneapolis to Fargo.

Under that act the maximum rate prescribed to Moorhead is 4.78. These are merely examples which might be multiplied indefinitely.

The bill with its exhibits presents this fair question of the *construction* of the provision of the Constitution that "the Congress shall have power to regulate commerce * * * * * * among the several states," and the Hepburn Act passed in enforcement of it: Is the construction to be such as to compel the company to reduce its interstate rates to conformity with those established by the state in order that it may obey the provisions of the Hepburn Act that "it shall be unlawful for any common carrier subject to the provisions of this act to * * * * * * subject any particular locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and so to permit the state to regulate interstate rates? Or is it to be construed so as to render the Congress incapable of enforcing that provision of the Hepburn Act by preventing discrimination against interstate points? Or is it to be construed so as to render these respective acts and orders complained of void as in contravention of the commerce clause of the Constitution? We submit that this presents a "substantial question" calling for the *construction* of the Constitution and a question of much vitality.

But it is intimated by counsel for the petitioner that the complainants did not rely on this question in the Circuit Court and that the only real controversy presented was whether the prescribed rates are confiscatory; and they cite cases tending to establish the doctrine that a spurious claim of right under a construction of the Constitution may

not avail to confer jurisdiction on the Circuit Court. Originally it was the only question presented by the bill of complaint; and although the temporary injunction was allowed on the ground that the prescribed rates are confiscatory, the following language of the Court in its decision on the motion will disclose how actively this point, as well, was pressed:

> "It is claimed on the part of the complainants that these regulations of rates in this state, passenger and freight, do interfere with interstate commerce, and instances have been cited as to their effect upon transportation between, we will say, the Twin Cities, and points on the border line of North Dakota; a comparison between the rates which the state has fixed, which would govern as between these cities and Moorhead, and rates which would govern transportation across the river to Fargo. And it has certainly been very persuasively argued that these rates, fixed by the Minnesota legislature in relation to transportation in Minnesota alone, do of themselves necessarily interfere with interstate commerce, and, under the provisions of the Hepburn Law, prohibiting discrimination in respect to localities similarly situated, it is claimed that if the railroad companies themselves, without authority of the state, should fix the present rates between these cities and Moorhead and the interstate rates now existing between these cities and Fargo (and the same with Grand Forks and other places) that they would be liable to prosecution for discrimination. And it would seem to be very difficult to avoid that conclusion, and the conclusion that these rates fixed in respect to Minnesota do necessarily and directly affect interstate commerce. * * *

> * * * But, as has been held by the Supreme Court in many cases, where Congress has the power to exercise control, as long as it fails to exercise it the states may exercise control in all matters that are proper—police regulations at any rate. And until Congress does exercise that control, and certainly while the Supreme Court continues to hold, as it has, that the states may regulate the local commerce that is entirely within the state, I do not think it would be proper that I should attempt to hold that these acts are void as invasions of the right of Congress to control exclusively the avenues of interstate commerce, although I must confess that the arguments to the effect that these particular acts of the Minnesota legislature do interfere, necessarily and directly, with interstate commerce, are extremely cogent."
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> Petition, pp. 122, 124.

II.

THE SUIT SEEKING TO RESTRAIN THE ATTORNEY GENERAL OF THE STATE FROM TAKING ANY ACTION AGAINST THE DEFENDANT RAILROAD COMPANY OR ITS OFFICERS OR EMPLOYES TO ENFORCE THE PROVISIONS AND PENALTIES OF AN UNCONSTITUTIONAL LAW IS NOT A SUIT AGAINST THE STATE.

Counsel for petitioner seem to concede that if the Attorney General of Minnesota has only ministerial duties to perform with regard to the acts or orders complained of, that is to say, if he is specially charged with their enforcement, an action against him to restrain the performance of such duties is not an action against the state under the Eleventh Amendment. But they claim that the Attorney General has by law no special duties with regard to

the acts or orders or any of them, but only discretionary and executive powers and that his only possible course in the exercise of such powers is the institution of a mandamus suit.

A.

The duties claimed to rest upon the Attorney General with regard to the Acts and Orders complained of are not merely discretionary, but are mandatory and ministerial.

Chapter 227, Gen. Laws Minnesota, 1905, is entitled "An Act Relating to the Duties and Powers of the Attorney General and His Assistants." Section 3 thereof provides:

> "Whenever any corporation shall have offended against the laws of the state, or misused, surrendered, abandoned or forfeited its corporate authority or any of its franchises or privileges he shall cause proceedings to be instituted against it."

If, then, the only possible method of proceeding against the defendant company by the Attorney General is by a mandamus action, then his duty to begin such an action is clearly ministerial. His duty to proceed against the company in case of violation of the act of April 18 by it is as clearly defined as it would be had the command to the Attorney General to take proceedings against it been contained in the act itself instead of in a general statutory provision applicable to all acts of the legislature. This was the view taken by the Circuit Court and expressed as follows:

> "It is not a matter that is left to his discretion as to whether he shall proceed or not; the statute requires

him to do so. As far as the alleged offenses for violation of this act are concerned, it seems to me that the direction to the Attorney General is just as potent as if it were included in the act itself."

Petition, p. 60.

Pritchard, J., in the North Carolina rate cases now pending, made the same ruling under similar conditions. In *Southern Ry. Co. v. McNeill* (Aug. 25, 1907), 155 Fed. Rep. pp. 772, 775, he says:

"It is insisted by counsel for defendant that there is nothing in the act of the legislature of 1907 which specially charges the Corporation Commission or the Attorney General with the enforcement of such act. This contention, in so far as it relates to passenger rates, with the exception of section 2 of the act, is undoubtedly true. Notwithstanding that such is the case, it must be borne in mind that sections 1066, 1113, 5380, chapter 15, and subdivisions, were a part of the general law relating to the management and control of railroads in North Carolina, and were in full force and effect at the date of the passage of the act in question, and still remain undisturbed as a part of the law applicable to the subject under consideration. Under the well-established rule of construction, these sections must be construed as forming a part of the law relating to the enforcement of any legislation that may have been enacted in regard to the subject fixing maximum rates. * * * * * * *

"Section 1113 of the Revisal of North Carolina of 1905 provides that the Commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending cor-

poration, and, in the event of a failure on the part of such corporation to comply with the law, 'shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient.'

"This provision is positive, and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the state, in regard to the fixing of maximum rates. This section, when construed in accordance with the rule laid down in the Reagan and Ames cases, clearly charges the Attorney General with a duty in relation to the enforcement of the act in question."

State ex rel. Young, Attorney General, v. Robinson, decided by the Supreme Court of Minnesota June 7, 1907, was an action for the removal of the Mayor of the City of St. Cloud and to recover a penalty provided by law for his failure as a municipal officer to enforce the provisions of the chapter of the Revised Laws of Minnesota covering the subject of intoxicating liquors. Section 1561 in that chapter provides: "Every County Attorney shall prosecute all cases under this chapter arising in his county." It was earnestly contended by the defendants that the Attorney General had no power to institute any action arising under this chapter. The Court says (112 N. W. Rep. at page 272):

"The office of Attorney General has existed from an early period, both in England and in this country, and is vested by the common law with a great variety of du-

ties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the legislature of the states of this country to attempt specifically to enumerate them. Where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at the common law. *State v. Kent,* 96 Minn. 255, 104 N. W. 948, 1 L. R. A. (N. S.) 826, 4 Cyc. 1028; *Hunt v. Railway Co.,* 20 Ill. App. 282; *Parker v. May,* 5 Cush. (Mass.) 336; *People v. Minor,* 2 Lans. (N. Y.) 396; *People v. Tweed,* 13 Abb. Prac. (N. Y.) 25. From this it follows that, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. We have no statutory restrictions in this state. The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General upon the same subject. We have numerous instances where particular duties are expressly imposed upon the county attorney, yet it is clear that the Attorney General has the right, in virtue of his office, to co-operate with or act independently of that official in all cases where the public interests justify it."

We, therefore, cannot concede the soundness of the position of counsel for the petitioner stated on page 15 of their brief filed with their petition in this Court as follows:

"The Attorney General as such has no right to institute criminal prosecutions for a failure to comply with the provisions of the law of Minnesota the enforcement of which was restrained by the order of the Circuit Court.

"A criminal prosecution under that statute to try an officer of the railroad company for a misdemeanor would be conducted by, and in charge of, the county attorney of the county in which the case was pending, and the Attorney General would have no duty with reference thereto until the case reached the Supreme Court of the State."

The Act of April 4, 1907, provides in section 2 thereof as follows:

"Any railroad company or any officer, agent or representative thereof, who shall violate any provision of this act shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or by both such fine and imprisonment."

The act of April 18, 1907, provides in section 6 thereof as follows:

"Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it, between stations upon its line of road in this state, of the commodities named in this act; and every officer, director, traffic manager or agent or employe of

such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by said railroad company of rates not exceeding those specified in this act; and any officer, director or such agent or employe of any such railroad company who violates any of the provisions of this section, or who causes, or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days."

The Revised Laws of Minnesota, 1905, in the chapter relating to the Railroad and Warehouse Commission, and after providing that common carriers shall adopt rates prescribed by the Commission, provides in section 1987 therein as follows:

"Any common carrier or warehouseman who shall do, or attempt to do, any act forbidden by this chapter, or shall fail to do anything therein required of him, or shall wilfully suffer or permit any such unlawful act or omission, when no specific penalty is imposed therefor, if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars, for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall for-

feit to the state for the first offense not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offense not less than five thousand dollars nor more than ten thousand dollars, to be recovered in a civil action. All fines and forfeitures collected under the provisions of this chapter shall be paid into the state treasury to the credit of the general revenue fund."

It seems that the Attorney General has positive mandatory instructions to take proceedings against the defendant company in case it shall fail to obey either act or order involved. If he has any discretionary power it exists only for the selection of the manner of his attack. The suit does not seek to control him in the exercise of any such discretion. It does seek to restrain him from any action at all. He may institute an action in mandamus, he may begin actions for penalties, he may cause the constantly recurring arrest and prosecution of the officers, directors, agents and employes of the company. When the Attorney General has selected his method of proceeding he has fully exercised all discretion permitted him. His remaining duty is ministerial only, because he is commanded by statute to take proceedings. Probably the method calculated most speedily to force the company to obey the acts would be the wholesale arrest and prosecution of its officers and employes. It is said that this method was adopted in North Carolina with the result that the railroad company involved quickly adopted the rates prescribed by the statute in question, although a Federal Judge had declared judicially that they were prima facie unreasonably low.

The fact is that the method of forcing a railroad company to obey the law through arrest and prosecution of its employes for their individual failure to obey it is the method furnished by the act itself. It cannot be that the State of Minnesota asserts a grievance against station agents of railroad companies for failure to comply with the law if they are commanded by their superiors not to do so. The failure to comply with the act is not theirs but the company's. The grievance of the State is against the company. The provision for fine or imprisonment of officers and employes is plainly directed against the company, and as a coercive measure against it and not against the employes. The company may not be imprisoned; and the most drastic and efficient method of procedure against the company is by the imprisonment of all who represent it. From the persistent efforts of the Attorney General to get away from the control of the Federal Court it is fair to presume that he desired to endeavor to force the defendant company to adopt the prescribed rates. It is fair to presume also that he intended to use a method that would force it—the North Carolina method.

It can make no difference in the plight of the complainants in the Perkins suit whether the Attorney General interferes with the conduct of its business by the railroad company under an assumption of duty or an assumption of power, so long as neither duty nor power exists . We hope to establish that it makes no difference in the propriety of their asking the protection of a court of equity against him.

B.

There is no proper distinction, so far as concerns this question, between ministerial duties assumed by the Attorney General without authority of law and discretionary powers so assumed.

The gravamen of the bill of complaint is that the acts and orders complained of are void so far as the defendant company is concerned; that the directors are deterred from ignoring them by the drastic penalties provided for failure to obey them; that if the company shall fail to obey them many civil suits and criminal prosecutions will result; that if the company shall fail to obey them the Railroad Commission and the Attorney General will take proceedings against it and its officers and employes to force it to do so. Therefore, the complainant stockholders seek to enjoin the defendant company from obeying the acts and orders, the defendant shippers from instituting any action against the company for its failure to obey them, and the Railroad Commission and the Attorney General from taking any action, step or proceeding to force the company to obey them. They are met by the assertion that so far as concerns the Attorney General a court of equity is powerless to protect the complainants because they seek to restrain him from the exercise of a discretionary power in the exercise of which he acts in behalf of and as the State. We are not advised, however, precisely what this discretionary power is, nor whence he derives it. It does not appear in the category of powers recited by the Supreme Court of Minnesota in *State ex rel. Young v. Robinson,* quoted above. It is not

als, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court,—a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this Court. It is to be presumed in favor of the jurisdiction of the Court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the Court can proceed no further, because it appears that certain mili-

> tary officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> "It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property, without due process of law, or to take private property without just compensation."

In *Noble v. Union River Logging Railroad*, 147 U. S. at p. 171, the Court, after examining cases upon the subject of the exercise of the judicial power in injunction and mandamus proceedings, involving discretionary or ministerial acts as the case might be, says:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no such power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

In *In re Tyler*, 149 U. S. at p. 190, it is said of *Pennoyer v. McConnaughy*, 140 U. S. 1:

"And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of *Osborn v. Bank of the United States*, 9 Wheat. 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the Eleventh Amendment is limited to those suits in which a State is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this Court; yet it was also rightly declared that the general doctrine there announced, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, has never been departed from."

Smyth v. Ames, 169 U. S. 466, was, so far as regards the question under discussion, precisely similar to the Perkins case. In that case the bill of complaint was made by a stockholder in several railroad companies against the companies and certain officers of the State of Nebraska constituting the Board of Transportation of the State as defendants. It alleged the enactment of a law by the legislature of the State prescribing rates to be charged by railway companies, and that that law was in its effect on the defendant railroad companies repugnant to the Fourteenth Amendment of the Constitution. It set forth grounds of equitable jurisdiction and prayed for a decree for an injunction. The Court, Mr. Justice Brewer presiding, made its decree enjoining the defendant companies from making the prescribed rates, enjoining the Board of Transportation and the members and secretaries thereof—

"From entertaining, hearing or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants or employes, done, suffered or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act."

And continued:

"And that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act."

169 U. S. at pp. 476-7.

The act in question did not impose on either the Board or the Attorney General any particular duty with regard to its enforcement, nor did any law of the State impose any particular duty on the Attorney General with regard to this act. It was contended that the real party in interest was the State and that the suit was in effect against the State. The Court said:

"It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them

> as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190; *Scott v. Donald*, 165 U. S. 58, 68; *Tindal v. Wesley*, 167 U. S. 204, 220."

And the decree was affirmed.

The principle announced in this case has, we think, never been qualified or departed from in any respect.

Much reliance is placed by counsel for petitioners on *Fitts v. McGhee*, 172 U. S. 516; and it is claimed with apparently vigorous confidence that that case announced and established a contrary doctrine to that of *Smyth v. Ames*. *Fitts v. McGhee*, however, is not at all in point. The case was this: The General Assembly of the State of Alabama passed an act in the following terms:

> "An Act to fix the maximum of tolls to be charged by the owners, lessees, or operators of the road bridge crossing the Tennessee River between the Counties of Colbert and Lauderdale and known as the Florence Bridge, and to fix the penalty for demanding or receiving a higher rate of toll.
>
> SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the maximum rate of toll to be charged by the owners, lessees, or operators of the bridge crossing the Tennessee River, between the Counties of Colbert and Lauderdale and known as the Florence Bridge, shall be as fol-

lows: For each foot passenger, 5 cents; for children under 14 years of age and all pupils attending school, 2 cents; for each one-horse vehicle and driver, 15 cents; for each two-horse vehicle and driver, 25 cents; for each three-horse vehicle and driver, 30 cents; for each four-horse vehicle and driver, 35 cents; for each additional person in vehicle, 5 cents; for each horse, mule or animal of like kind, with rider, 8 cents; for each horse, mule or animal of like kind, 5 cents; for each cow, steer, or animal of like kind, 5 cents; for each sheep, hog, goat or animal of like kind, 3 cents.

SEC. 2. *Be it further enacted,* That should the owners, lessees or operators of said toll bridge, by themselves or any of their agents, demand or receive from any person a higher rate of toll than is prescribed by this act, he or they shall forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public and ex-officio justice of the peace of either of said counties of Colbert or Lauderdale.

Approved February 9th, 1895."

On the fifth day after the approval of the act the receivers of the railroad company which owned the bridge instituted an action against "the State of Alabama, W. C. Oates, as Governor of the State of Alabama, and William C. Fitts as Attorney General of the State of Alabama." The bill of complaint set forth that the rates prescribed by the act were noncompensatory, that the penalties prescribed had the effect to deter the complainants from testing the act by legal proceedings, that they were remediless except in equity, and prayed that process be issued to the State of Alabama, Oates as Governor, and Fitts as Attorney General, requiring them to answer "in behalf of the

State," and prayed an injunction against them and all persons whomsoever from instituting any proceedings against the complainants under the forfeiture clause of the act. No charge was made against either Oates, the Governor, or Fitts, the Attorney General, that he had assumed, had threatened to assume, or was under any reasonable suspicion of intending to assume any duty or authority to enforce the law. The bill of complaint did not place either of them in the class to which the Attorney General belonged in the case of *Smyth v. Ames*, and to which the petitioner in this proceeding belongs in the Perkins case below. They were not sued as private individuals, who, acting under the guise of authority and without it, and taking advantage of their official position, are consummating or threatening unlawful interference with the rights of complainants by virtue of an unconstitutional law. They were sued as officers of the State simply. Apart from the question whether the bill showed any equities as against the Governor and the Attorney General, there were no other defendants, and those officers were not even proper parties defendant to protect the exercise of equitable jurisdiction of the Court, and aid in the enforcement of its decrees. The suit was in the first instance apparently a bald attempt to determine the question of the constitutionality of a law by proceeding against the executive officers of the State as such. There is a wide distinction between such a case and the Perkins case here under consideration.

A temporary injunction was issued by the Circuit Court in accordance with the prayer of the complaint. Subsequently the complainants amended their bill by the insertion of averments to the effect that divers and sundry per-

sons had paid the tolls fixed by the complainants under protest, and had threatened to institute suits against the complainants under the penalty clause of the act, and had also threatened to procure proceedings to be instituted by the Governor and Attorney General in the name of the State to compel complainants to adopt the rates prescribed by the act. One Gilliam was mentioned particularly as one of the persons who had made such threats. Thereupon the bill was amended by making Gilliam a party defendant, and subsequently an order of injunction was entered including Gilliam within its terms. Later still, and by another amendment, complainants set forth that many indictments had been found by the grand jury of the Circuit Court of Lauderdale County, Alabama, against the toll gate keepers of the bridge. These indictments were found, not under the act complained of as void, but under Section 4151 of the Criminal Code of Alabama, which is as follows:

> "Any person who, being or acting as an officer, agent, servant or employe of any turnpike company, macadamized road company or other incorporated road or bridge company, takes, receives or demands any greater charge or toll for travel or passage over such road or bridge than is authorized by the charter of such company, or if the charter does not specify the amount of toll to be charged or taken, fixes, prescribes, takes, receives or demands any unreasonable charge or toll to be determined by the jury must on conviction be fined not more than one hundred dollars."

The complainants further set forth that one Carmichael was the solicitor for such Judicial Circuit, and

as such was engaged in the prosecution of these indictments. They prayed that Carmichael be also made a party defendant, and that a restraining order be issued enjoining him and all other persons from the prosecution of such indictments. Upon the filing of this amendment the Court entered an order of injunction restraining Carmichael "from instituting or prosecuting, as such solicitor, any indictment or criminal proceeding against any one for a violation of the alleged unconstitutional act of the legislature of Alabama described in the bill." Demurrers were interposed by the various defendants and the cause was heard upon the demurrers. The final decree declared the act of February 9, 1895, to be violative of the constitutional rights of the complainants in that it fixed a rate of tolls which was not reasonably compensatory. The act was therefore declared to be inoperative, and the injunctions theretofore granted were made perpetual. A writ of error was taken to this Court. The Court held, first, that the suit was a suit against the State; second, "that the Circuit Court of the United States sitting in equity was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the State Court," and the judgment of the Circuit Court was reversed with directions to dissolve the injunction restraining the institution or prosecution of indictments or other criminal proceedings in the State Court, and to dismiss the suit brought by the receivers against the Attorney General and Carmichael as solicitor.

This case seems to be relied upon chiefly by counsel for the petitioner in this proceeding. It was, however, a plain case of a suit against the State. It did not to

any extent present the same basis for jurisdiction either over the subject matter of the action or the parties defendant as the Perkins case here under consideration. Neither party defendant was assuming any power or authority under the act in question. The Governor was not, nor was the Attorney General, taking or threatening any action whatsoever against the complainants. Whatever action the solicitor Carmichael was taking was not by virtue of any authority assumed by him under the provisions of a void law, but under the provisions of a law—Section 4151 of the Criminal Code of Alabama—the validity of which was not denied. This section did not refer to the act of Feb. 9, 1895. It did not provide for prosecution of those who should charge for toll more than was prescribed by any law of the State, but only those who should charge more than a jury should determine to be reasonable. The injunction against Carmichael, then, sought to restrain him from prosecution of actions under the valid criminal laws of the State. It was not a case where "if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

> *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S. at p. 218.

That this Court recognized the distinction between the case of *Fitts v. McGhee* and a case like the Perkins case

may be demonstrated by the following taken from its decision:

> "There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

If there are to be found expressions in the decision, which taken alone would seem at a superficial reading to be con-

tradictory of the principles above quoted from *Smyth v. Ames,* they should be considered in the light of the following words of Mr. Chief Justice Marshall, in *Cohens v. Virginia,* 6 Wheat. at page 399:

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Fitts v. McGhee has been cited by this Court in the following cases:

Ilinois Central R. R. Co. v. Adams, 180 U. S. 28.
Minnesota v. Brundage, 180 U. S. 499.
Pacific Whaling Co. v. U. S., 187 U. S. 447.
Prout v. Starr, 188 U. S. 537.
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.
Barney v. City of New York, 193 U. S. 430.
Gunter v. Atlantic Coast Line, 200 U. S. 273.
In re Lincoln, 202 U. S. 178.
McNeill v. Southern Ry. Co., 202 U. S. 543.

It was cited in the case of *Pacific Whaling Co. v. United States, Davis & Farnum Mfg. Co. v. Los Angeles,* and

Gunter v. Atlantic Coast Line, to the proposition that equity will not entertain a bill to restrain criminal prosecutions.

It was cited in *In re Lincoln* and *Minnesota v. Brundage* upon a question not here material.

It was cited in *Illinois Central R. R. Co. v. Adams*, in support of the proposition that "the question whether a suit nominally against an individual by name is in reality a suit against the State within the Eleventh Amendment to the Constitution, is a defense to the merits rather than to the jurisdiction of the court."

It was cited in the case of *Prout v. Starr* in support of this language of the Court:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the

passage of State laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment. *Hans v. Louisiana*, 134 U. S. 1, 10; *North Carolina v. Semple*, 134 U. S. 22; *Harkrader v. Wadley*, 172 U. S. 148; *Fitts v. McGhee*, 172 U. S. 516."

It was cited in the case of *Barney v. City of New York*, in support of the following language of the Court:

"There are many cases in this Court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii;* and in *Pennoyer v. McConnaughy*, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal v. Wesley*, 167 U. S. 204, and *Fitts v. McGhee*, 172 U. S. 516."

It was cited in the case of *McNeill v. Southern Ry. Co.*, in support of this proposition:

"We think the real object of the bill may properly be said to have been the restraining of illegal interference with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being

> based upon the assumed authority of a State statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the bill was not in any proper sense one against the State. *Scott v. Donald*, 165 U. S. 107-112; *Fitts v. McGhee*, 172 U. S. 516-529, 530."

We think we are fully justified, therefore, in the view that *Fitts v. McGhee* was not considered to be, at the time of the making of the decision, and has never since been considered by this Court to be in opposition to or in qualification to any extent of the rule laid down in *Smyth v. Ames*, as follows:

> "It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of the State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of that (the Eleventh) Amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190; *Scott v. Donald*, 165 U. S. 58, 68; *Tindal v. Wesley*, 167 U. S. 204, 220."

If *Fitts v. McGhee* was ever intended to lay down a rule contrary to that of *Smyth v. Ames*, it must be considered as having been overruled.

Smyth v. Ames was decided in 1897. *Fitts v. McGhee* was decided in 1898. Subsequently, and in 1901, the case of *Starr v. Chicago, Rock Island & Pacific Railway Company*, a companion suit to *Smyth v. Ames*, came before Sanborn, Circuit Judge, and Munger, District Judge, on

a demurrer to a supplemental bill of the complainants seeking to have the injunction theretofore entered against the Attorney General extended to cover one Prout, who had succeeded the former incumbent as Attorney General of the State. The demurrer was interposed probably because of the decision in *Fitts v. McGhee*, and because it was charged that that decision qualified the rule in *Smyth v. Ames*, above quoted. The demurrer was overruled and a writ of injunction issued against Prout in the same terms as that theretofore issued against his predecessor in office. An appeal was taken to this Court and was decided under the name of *Prout v. Starr*, 188 U. S. 537, in 1903. Apparently, here also reliance was had upon the proposition that the rule in *Fitts v. McGhee* had qualified that theretofore laid down in *Smyth v. Ames*. The Court, however, restated and reaffirmed the rule in *Smyth v. Ames*, as above quoted, and, following Sanborn, Judge, in the Court below, held further as quoted above. (See pages 44-45 *supra*.)

This language of the Court ought to be a sufficient answer to any claim that the decision in *Prout v. Starr* was made simply because it was the law of the case. Moreover, the rule has since been acknowledged and repeated by this Court in *Dobbins v. Los Angeles*, 195 U. S. 223, at page 241, and in *Gunter, Attorney General, v. Atlantic Coast Line*, 200 U. S. 273, at page 284. In both of these cases *Fitts v. McGhee* was urged upon the attention of this Court.

C.

Furthermore, it may be said that in the Perkins case the State of Minnesota as such is not the real party in interest.

No attack is made on any property rights of the State. The State has, in the exercise of its governmental functions only, enacted a law designed to prescribe the terms of contracts, not between itself and common carriers, but between shippers and common carriers. The relief prayed is not against the State, and a decree will not operate against the State nor affect it as such to any extent whatsoever. The suit, therefore, differs from *In re Ayers*, 123 U. S. 443, *Hagood v. Southern*, 117 U. S. 52, and other cases of like nature. Full support for this proposition is had in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, at p. 390.

It cannot be successfully urged that the Court may not exercise jurisdiction over the person of the Attorney General, merely because the question whether it has such jurisdiction properly depends on the question whether the acts in question are void. In *Chicago & Northwestern Ry. Co. v. Dey*, 35 Fed. Rep. 866, at p. 871, Mr. Justice Brewer says:

> "The defendants claim that they are simply attempting to carry into effect the mandates of the State, as expressed in one of its laws; but if that law be unconstitutional, it is no law, and they have no authority for their actions. This proceeding is a judicial inquiry to see whether they have authority for their actions; whether the law upon which they rely is valid and constitutional, or sufficient to justify the actions which they are taking."

And further, at p. 872:

"Indeed, the question of jurisdiction is a doubtful one, but the fact that it is doubtful is no ground for refusing to entertain jurisdiction. I can close this branch of the case in no better way than by quoting the language of Chief Justice Marshall, in the case of *Cohens v. Virginia,* 19 U. S. 6, Wheat. 264 (5 L. ed. 257):

"'The Judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given; the one or the other would be treason to the Constitution.'

"I commend these words of America's greatest Judge to the thoughtful consideration of those who, realizing that the primary duty of the courts is the protection of the rights of persons and property, nevertheless sometimes hastily denounce their, as supposed, at least, unwarranted interference."

Counsel for the petitioner lay stress on a claim that the mandamus action instituted by the Attorney General was a suit by the State, and when it was enjoined the State was enjoined. This argument begs the question. The action of mandamus is "nothing more than an ordinary proceeding or action in which the performance of a specific duty by which the rights of the petitioner are affected is sought to be enforced."

Hartman v. Greenhow, 102 U. S., at p. 675.

"When the object of the action is to enforce a pub-

> lic duty not due the government as such, any private person may move to enforce it."
>
> *State v. Weld*, 39 Minn. 426.

The relator is the plaintiff. If, then, the State of Minnesota was the plaintiff in the action instituted in the District Court of the County of Ramsey, Minnesota, to enforce the Northern Pacific Railway Company to obey the Act of April 18, 1907, it is because the relator Edward T. Young, as Attorney General, represented the State. But it is clear that he can represent the State only in actions to enforce valid laws. The action in question sought to enforce an act which had been judicially declared not to be a law because in contravention of the Constitution of the United States. His proceeding was, therefore, wholly beyond and outside his authority as a representative of the State, and he cannot by any proper intendment be said to have instituted it "in behalf of and as the State," as is claimed in his behalf.

III.

NO COURT, FEDERAL OR STATE, CAN AFFORD EQUITABLE RELIEF AGAINST LAWS OF THE KIND INVOLVED IN THE PERKINS SUIT, UNLESS THE ATTORNEY GENERAL MAY BE RESTRAINED FROM PROCEEDINGS TO ENFORCE THEM.

In Section 5 of the Act of April 18, 1907, it was provided:

> "This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission except that no duty shall rest upon the Railroad

and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State."

In view of the supposed distinction between unlawful acts under a ministerial duty assumed without authority, and such acts by virtue of a discretionary power so assumed, it was believed generally that the act ot April 4, 1907, and the act of April 18, 1907, in that they did not impose on anybody the special charge of enforcing them, had been so shrewdly framed as to render it impossible for the railroad companies interested to sue for equitable protection against their effect. It was by many considered a matter of congratulation that the legislature had enacted rate laws which, whether or not constitutional, the railroad companies could not successfully contest. If that distinction were sound and if the Attorney General has only discretionary powers with regard to the acts, the congratulatory feeling, however meretricious, would seem to be warranted in fact. The railroad companies might not be complainants in any action to test the validity of the laws. Their only course would be to refuse to obey them, to submit to the arrest of as many of its officials and employes as many times as the Attorney General or county attorneys might see fit, and to subject them to the danger of the extravagant punishments provided by the acts. The natural result would be that no employes could remain with the railroads. The force would be disorganized and the railroads would be unable to continue in business unless they should adopt the prescribed rates. There would, of course, be a defence in the criminal proceedings. A defence could be made on

the ground that the rates prescribed would not yield sufficient revenue to afford a reasonable return on the value of the railroad property. This before a jury in a criminal case. The result might be that the defence would hold good in eighty counties of the State and insufficient in one county. On this question the views of the Court below were as follows:

> "The court in the trial of a criminal case brought to recover penalties or fines, or seeking imprisonment of the party indicted would have no machinery or means to determine whether these rates were reasonable or unreasonable, or whether they went to the extent of confiscation or not. It will be a very difficult question for any court to determine, mixed as these rates are, with rates fixed by the interstate commerce commission respecting interstate traffic, whether they were reasonable. It would be a very complex question for any court to determine as to the effect of those local rates, whether they were confiscatory or not. That matter certainly could not be determined in a criminal action brought for an alleged violation of those laws. Therefore there can be no remedy afforded by any state court in this case on the question as to whether as claimed in these bills of complaint the law is actually confiscatory and therefore unconstitutional; and the railroad companies and stockholders, if denied a remedy in this court, would be without remedy, they would be remediless; and the provision of the Constitution which is intended to protect persons in the ownership of property as against a State would be rendered nugatory."
>
> Petition, p. 60.

We submit that these views are sound and that if in such cases the Attorney General may not be made a party defendant the railroad companies are without protection against the operation of whatever laws the conscience of legislators may permit them to enact.

Such is the case if the railroad companies affected by the acts shall be left to their own resources. In a stockholders' suit like the Perkins suit the jurisdiction of the Court is invoked to protect the property rights of the complainants. Doubtless there would have been sufficient complainants and defendants and a sufficient cause of action—a complete suit —if the railroad company and the representative shippers only had been made defendants. Doubtless a valid injunction could have been entered against the defendants in such action. But the attempt of the court to protect the property rights of the complainants would be wholly unavailable if the Attorney General were causing wholesale arrests of the railroad company's employes and rendering it incapable of doing business. The railroad would remain, but the value of its use would be gone. The Court says, in *Springfield Spinning Co. v. Riley,* L. R. 6 Eq. 558, cited in *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S. 207:

> "The jurisdiction of this Court is to protect property and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property or to make it less valuable for use or occupation."

Finally, we think the case falls well within the rule laid down by this Court in *Pennoyer v. McConnaughy,* 140 U. S. 1, at p. 18, as follows:

"It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished, in principle, from *Osborn v. Bank of the United States, Davis v. Gray, Board of Liquidation v. McComb,* and *Allen v. Baltimore & Ohio Railroad Co.,* cited above, and the reasoning in those cases applies with equal force in this. The essential difference between these cases and the case of *In re Ayers,* upon which the appellants mainly rely, was pointed out in the last named case, and need not be adverted to further in this connection. We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, if, as is contended for, the legislation of the State under which the defendants are assuming to act is unconstitutional, in that it operates to impair the obligation of a contract."

JARED HOW,
PIERCE BUTLER,
WILLIAM D. MITCHELL,

Solicitors for William H. Grimshaw, United States Marshal for the District of Minnesota.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

NO. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

BRIEF FOR THE UNITED STATES MARSHAL UPON ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT ISSUE.

CHARLES W. BUNN.

Supreme Court of the United States.

NO. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

The Circuit Court of the United States for the District of Minnesota, in a suit brought in that court by Perkins and Shepard against the Northern Pacific Railway Company and others, enjoined the railway company not to obey a certain act of the Legislature of Minnesota fixing railway freight rates; enjoined shippers and receivers of freight from taking proceedings to enforce the act; and similarly enjoined the Attorney General of the State (Petitioner here) from instituting such proceedings. Notwithstanding this decree the Attorney General afterward commenced in a State Court against the railway company a mandamus action to compel it to obey the act. The Circuit Court, after

hearing, ordered him to discontinue the action in the State Court and committed him to the custody of the Marshal until he did so. He applies here for habeas corpus challenging the jurisdiction of the Circuit Court to make this order.

The petitioner submits to the court two contentions:

(a) That the bill in the suit of Perkins and Shepard alleged no federal question and no such diverse citizenship as is required to give the Circuit Court jurisdiction.

(b) That the Circuit Court had at least no jurisdiction to enjoin the Attorney General, or to order dismissal of his action in the State Court.

I.

The jurisdiction of the Circuit Court rests upon federal questions set forth in the bill.

The suit was brought by Charles E. Perkins and David C. Shepard, two stockholders of the Northern Pacific Railway Company, on behalf of all its stockholders against (a) the railway company, (b) Evarts, Whiteman, Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud, shippers and receivers of goods over the railway, sued as representing the whole class of shippers and receivers, and (c) the petitioner, Edward T. Young, who was Attorney General of Minnesota, and Mills, Staples and William E. Young, who were railroad commissioners of the state.

The plaintiffs complained of an order of the Railroad Commissioners reducing merchandise freight rates, an act of the Legislature reducing commodity freight rates and a second act reducing passenger fares. This order and these legislative acts are more particularly described as under:

(1) An order of the Railroad and Warehouse Commission dated September 6, 1906, effective thirty days after service (Petition for writ, p. 16), covering all the ten classes of classified freight, and making 20% to 25% reductions in the rates of defendant railway company, which reductions are shown more exactly in Exhibit 3 printed in the petition for writ, p. 25 (See also Petition, p. 126).

(2) An act of the Legislature, passed April 18, 1907, effective June 1, Exhibit 4, attached to the bill (Petition, p. 27) making large reductions shown more exactly in Exhibit 5 (Petition, p. 31) in the defendant railway company's rates upon wheat, flour, coarse grain, lumber, sheep, hogs, cattle and hard and soft coal.

(3) An act of the Legislature passed April 4, 1907, effective May 1, Exhibit 6 (Petition, p. 33) reducing passenger fares from three to two cents per mile.

Before the bill was filed, which was upon the 31st day of May, the railway company had put into effect the said reductions in rates upon classified freight and upon passengers but the legislative act of April 18, reducing rates upon the commodities re-

ferred to, had not then become effective. The bill showed that the defendant railway company proposed to put the reductions of that act into effect upon the following day.

The bill presented three federal questions:

(1) That each of the proposed legislative and commission rates was unreasonably low and confiscatory.

More in detail the allegations were: that the two cent passenger rate would not afford the railway company sufficient revenue to pay the cost of its passenger business within Minnesota and would yield no return whatever upon capital invested (Petition, p. 13): that the tariffs on freight prescribed by the Commissioners' order and by the legislative act of April 18 were constructed upon the principle of a charge for terminal service plus a per mile charge for hauling service, the hauling service charge being materially higher for short distances than for long, so that beyond a distance of from two to three hundred miles the tariffs were made by adding a constant and very small hauling charge for additional distance; and that this added charge for distances over two hundred miles would not pay the actual cost of hauling the added distance, and was therefore unreasonable and confiscatory (Petition, p. 11, 12); (note that the tariffs covered distances to four hundred miles, supposed to be the maximum haul wholly within the State). As originally filed the bill contained this allegation (Petition, p. 13):

"While the immediate effect of said Orders and of said Act, approved April 18, 1907, if it could be confined to the State of Minnesota, might not be to take the property of said Railway Company without due process of law, yet if the principle upon which the tariffs are made, as above described, should be applied to the long haul interstate business of said company, and if the percentages of reduction effected by the said Orders and said Act should be applied to said company's local business in other states (which is now being transacted upon rates fair and equal by comparison with said company's Minnesota rates prior to said Orders and said Act), they would operate to confiscate the railroad of said company, and to deprive it of property without due process of law, in violation of the Constitution of the United States, because such measure of reduction would leave said company without any net earnings whatever from its property."

Before the hearing the bill had been amended by striking out the allegation last quoted and inserting in lieu thereof the following (Petition, p. 92):

"Your orators also show and allege that the said Orders of September 6, 1906, and May 3, 1907, and the said Act of April 18, 1907, and the reduction of the tariffs and charges of the said Railway Company therein and thereby prescribed, upon the merchandise and commodities specified therein respectively, are each and all of them unjust, unreasonable and confiscatory, and they, and each and all of them, would and will, if enforced, deprive your orators and the said Railway Company of their property without due process of law, and deprive them and it of the equal protection of the law, contrary to and in violation of the Constitution of the United States and the amendments thereof."

The bill alleged (Petition, p. 11) that the tariffs of the railway company in Minnesota were, before the proposed reductions, reasonable and fair as compared with its rates in other states (Wisconsin, North Dakota, Montana, Idaho, Washington and Oregon), and as compared with its interstate rates (so that if the proposed reductions in Minnesota were reasonable, proportionate reductions in all its rates were equally reasonable).

Upon the allegations thus briefly summarized the plaintiffs alleged a taking of property without due process of law contrary to the Constitution of the United States, and asserted that their allegations brought the case within the principles laid down by this Court in *Smyth v. Ames*, 169 U. S. 466, 522, 540-43 and other cases.

(2) That the penalties provided in each of the said legislative acts are so drastic, as that no owner or operator of property could go into court to contest the validity thereof except at the risk of confiscation of his property and long terms of imprisonment in jails and penitentiaries; for that reason it was alleged that the acts and each of them, deprived the plaintiffs and their property of the equal protection of the laws and of due process of law (Petition, p. 62). The plaintiffs evidently sought to bring the case in this respect within the language used in deciding *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 99-102. (See also *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, 394-6).

It cannot be said that a federal question is not

presented by allegations, which the Court said in the *Cotting case*, do present a very serious and at least very debatable federal question.

The penalties in the acts here under consideration, condemned by Judge Lochren as "vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any Legislature," (Petition, p. 118) are:

IN THE FREIGHT ACT:

> "Every railroad company transacting the business of a common carrier within this state shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it, between stations upon its line of road in this state, of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by said railroad company of rates not exceeding those specified in this act; and any officer, director or such agent or employe of any such railroad company who violates any of the provisions of this section, or who causes, or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days."

IN THE PASSENGER ACT:

> "Any railroad company or any officer, agent or representative thereof, who shall violate any

provision of this act shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years or both such fine and imprisonment."

AS TO THE COMMISSION'S ORDER:

Revised Laws of Minnesota, 1905, sec. 1987, applies and says:

"Any common carrier or warehouseman who shall do, or attempt to do, any act forbidden by this chapter, or shall fail to do anything therein required of him, or shall wilfully suffer or permit any such unlawful act or omission, when no specific penalty is imposed therefor, if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offence, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offence; and, if such carrier or warehouseman be a corporation, it shall forfeit to the state for the first offence not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offense not less than five thousand dollars nor more than ten thousand dollars, to be recovered in a civil action. All fines and forfeitures collected under the provisions of this chapter shall be paid into the state treasury to the credit of the general revenue fund."

These penalties are much more drastic than those considered in the case of *Cotting*. For violation of the Commission's order the penalty is $2500 to $5000 for the first offense, $5000 to $10,000 for each subsequent offense; and we apprehend it will not be questioned that each shipment constitutes a separ-

ate offense. For each violation of the commodity freight law the penalty is not exceeding ninety days in the county jail for each officer, director, agent or employe who disobeys, or who counsels, advises or assists the corporation to disobey. Violation of the passenger law is made a *felony* punishable by fine not exceeding $5000, or by imprisonment in the state prison not exceeding five years, or both such fine and imprisonment. If our information be correct that each month the defendant railway receives about 60,000 shipments coming under the Commissioners' order and about 500 coming under the legislative freight act, and carries about 100,000 passengers to whom the passenger act applies, thirty days' cost of testing the order and the two statutes would be: 60,000 violations of the order at $10,000 each, equals $600,000,000 and 100,000 violations of the passenger law at $5,000 each, equals $500,000,000. And several officers and agents would for each violation of either law be involved in imprisonment penalties.

(3) The bill was planted upon a third federal question, an alleged interference by the proposed reductions in rates with the exclusive power of Congress to regulate interstate rates.

Briefly summarized the bill as to this point set forth: the defendant company's lines of railway traverse a grain field lying in three states and partly in Minnesota, all the grain going to two markets both reached by defendant's lines, viz., Minneapolis and Duluth; all the coal moved into

this grain raising country comes from Duluth (Duluth is named as including Superior, West Superior and other points at the head of the lake); all cattle, sheep and hogs produced along these railway lines move to one market, viz., St. Paul (or points beyond); the lumber produced in Minnesota is carried by the railway to various points in that state, Wisconsin and North Dakota; the conditions attending the transportation of these commodities are the same locally in each of the states named and the same as those attending movement of the same freight across or between states; this is also true as to passengers and classified merchandise; all the traffic moving locally in Minnesota goes in the same trains with interstate traffic, and all is handled as one business by the same instrumentalities, agents and employes. In view of these and other facts alleged, the bill says, that the conditions of transportation being the same and no competition of markets existing to disturb normal rates and it being the legal duty of the railway under the Interstate Commerce law and other law not to discriminate, not only the railway company had theretofore charged, *but it must in obedience to law continue to charge*, substantially the same rates upon the same articles throughout the whole territory described, regardless of state lines, and regardless of whether the traffic is local within a state or interstate.

The rates established voluntarily by the railway company having been theretofore uniform through-

out the territory described in the bill, Wisconsin, Minnesota, North Dakota, (and Montana as to part of the traffic), the Minnesota action challenged would, it was alleged, reduce the local rates in that state far below the interstate longer haul rates established as provided in the Interstate Commerce act, and below the local state rates in the remainder of the alleged homogeneous territory. The plaintiffs said there was no principle upon which a carrier could increase its *rate of charge* as distance lengthens (the correct principle being to reduce the rate) and that therefore the Minnesota proposed rates must necessarily and inevitably reduce the interstate rates.

Upon the facts thus briefly indicated plaintiffs said that the Minnesota reduction operated *directly* upon the interstate rates, and were thus an infringement upon the authority of the National Government (see Bill of Complaint, Petition, p. 8, 10, 11, 12, 13).

And because that the proposed Minnesota freight rates did not afford pay for the added cost of hauling beyond two hundred miles, and because there was said to be no legal justification for a carrier raising its rate of charge as its haul increases, it was said that the long haul interstate rates certainly could not *exceed* the Minnesota rate, and that even if the proposed Minnesota rates (could they be confined to that state) would yield some revenue, nevertheless their extension to long distances (which was as plaintiffs urged compulsory) would confiscate the railway, depriving it of all earnings.

It is not necessary, nor is it fitting, upon this application, which involves only the jurisdiction of the Circuit Court, to argue the merits of the federal questions upon which the bill is predicated. The statement of them shows that each is a real and live question actually involved in the case and necessary for its decision. Upon every one of them this court would, we think, listen with interest to argument. If so, every one of them conferred jurisdiction upon the Circuit Court.

The last two questions put involve upon their face the *interpretation, scope and effect* of the Constitution of the United States. The first, the question of confiscation, does so equally, though as to it the turning question probably will be, after the evidence is taken, whether the *facts proved* bring the case within the settled interpretation of the instrument. But alleged confiscation gives the Court jurisdiction even though the law complained of may be valid upon its face, and though its invalidity depends wholly upon the facts proved in the cause. Such was the case of *Smyth v. Ames.* There the law was valid upon its face and the question of confiscation turned wholly upon the evidence; the decree finally entered recognized that the law might become valid if facts changed.

A case arises as much under the Constitution of the United States where the question is, whether the facts bring it under the Constitution, as where the inquiry touches more directly the meaning of language used in that instrument. The *application and effect* of the Constitution is as much a federal ques-

tion as its *interpretation*. The parties entitled to sue are entitled to the judgment of the Federal Courts upon the facts as well as upon the law. This was expressly decided in *Smyth v. Ames*, 169 U. S. 466, 518, and in *Hastings v. Ames*, 68 Fed. Rep. 726. See *Osborn v. United States Bank*, 9 Wheat 821-3; *In re Lennon*, 166 U. S. 548; *Mississippi Railroad Commission v. Illinois Central R. R.*, 203 U. S. 335.

For illustration, in cases involving impairment of the obligation of contracts the deciding question is oftenest, not what the Constitution means, but whether there was a contract, and what are its meaning and terms, all of which are frequently questions of fact. But this Court has repeatedly affirmed its jurisdiction, even of writs of error to the State Courts, where the sole inquiry is, whether there was a contract; *Stearns v. Minnesota*, 179 U. S. 223, 232-3 and cases cited; so the Circuit Court entertains jurisdiction grounded upon the same question; *City Railway Co. v. Citizens Street Railroad Co.*, 166 U. S. 557; *Detroit v. Detroit Citizens St. Ry. Co.*, 184 U. S. 368; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65.

Whether the Constitution applies to the facts is as much a federal question as is a direct inquiry touching the meaning of its language. The cases cited by petitioner are cases where either the federal question was colorable only, or where the controversy did not turn upon it, or where the federal question did not appear from the plaintiffs' own showing.

The remarks of Mr. Justice Harlan in *Fitts v. McGhee*, to the effect, that an adequate remedy was open in the State Courts by way of defense in those courts and ultimate writ of error to this Court, must be considered with reference to the facts in that case, which seems to have been a suit merely to test the constitutionality of a State law without any circumstances warranting resort to equity. In this case resort to the State Courts, either by way of complaint or defense, was forbidden the corporation, and obviously intended to be forbidden, by the extraordinary and drastic penalties denounced against it. As the Court below well said, no corporate officer would, in the face of them, expose the property of which he was trustee to annihilation, and himself and his employes to imprisonment. Should the suit or defense not succeed, the fines would shortly equal the value of the railway, and the Minnesota jails and state prison would be filled with railway officers, agents and employes, even with their advisers and counsel. The decision in *Smyth v. Ames*, opinion, p. 517-18, is conclusive authority, that the multitude of fines was of itself sufficient reason for the stockholders going into equity. Besides the fines, every shipper would have had his action, had the company resisted. Moreover, the stockholders had to sue in equity if they desired to stop the consummation of the alleged wrong, for the corporation proposed to put in the obnoxious tariff. In every view, if the stockholders desired to contest they were justified in going into equity, and indeed could go nowhere else. The threatened in-

jury could in no other way be averted. Having a good cause in equity, no doubt can be entertained that the Federal Circuit Court was open to them. For just such cases was it created. They were not bound to submit their cause to the courts of the State. Cases like this, where the findings of fact are so nearly conclusive, are peculiarly the cases that the courts of the United States were created to try. *Smyth v. Ames*, opinion, p. 515-17; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, 395; *Davis v. Gray*, 16 Wall. 203, 221.

II.

The petitioner asserts, that inasmuch as he was the Attorney General of Minnesota and only proposed to enforce in that capacity the state act of April 18, the Circuit Court was without jurisdiction to prevent him from so doing.

It is necessary to consider the petitioner's relation to the case, his powers and action and what was really done in the Circuit Court.

Let us repeat that the suit attacked and sought preliminary and perpetual injunction concerning (a) an order of the Railroad Commission reducing class rates; (b) two acts of the Legislature, one reducing passenger the other commodity freight rates.

As to the order of the Commission, that body was charged by law with its enforcement (Revised Laws Minn. 1905 Sec. 1975) and the Attorney General is by statute the Attorney of the Commission, there-

fore its agent and charged with its duties. Sec. 1960 of the Revised Laws of Minnesota 1905 defines his relation to the Commission thus:

> "The attorney general shall be *ex officio* attorney for the commission. He shall institute and prosecute all actions which the commission shall order brought, and shall render the commissioners all advice, counsel, and assistance necessary for the proper performance of their duties. The county attorney of any county in which an action is pending, prosecuted, or defended by the direction of the commission shall aid in the prosecution or defense thereof until final determination, when requested by the commission. When necessary, the commission may employ additional counsel to assist the attorney general."

As to the two legislative acts the same statutes Sec. 58 lay down his duty thus:

> "He shall cause to be prosecuted all assessors and other officials for such delinquencies in connection with the revenue laws as may come to his knowledge; also all bonds of officers and others upon which any liability to the state has accrued. Whenever any corporation shall have offended against the laws of the state, or misused, surrendered, abandoned, or forfeited its corporate authority, or any of its franchises or privileges, he shall cause proceedings to be instituted against it."

Although the commodity freight act contains a provision in Sec. 5 that no duty shall rest upon the railroad commission to enforce that act, or any other legislative act fixing rates (a provision, based upon some expressions in the opinion of this Court in *Fitts v. McGhee*, 172 U. S. 516, and cunningly designed to prevent the carriers from challenging in

court the validity of the law) the Railroad Commission remained charged with the duty of enforcing its own order, and the Attorney General charged as to both laws and order with the duty expressed in the statutes quoted.

The plaintiffs, challenging all three rate reductions, made defendants the Railroad Commissioners, though they were interested only as to their own order, the Attorney General because of his statutory duties, and doubtless out of a desire to invite in everybody who had an interest and who might wish to be heard. It would have savored of collusion indeed had they not joined the Attorney General.

The plaintiffs also complied with and made a case under the 94th equity rule and therefore had a suit well founded as against the defendant railway company. They also joined six well known citizens of the State, interested in the suit as shippers and receivers of freight and alleged as to them (Petition, p. 8):

> "The defendants, E. A. Evarts, O. J. Whiteman, J. Rumsey Reeve, Achille Michaud, Charles Michaud and Adolph E. Michaud are hereby designated as shippers, each being a person engaged within the State of Minnesota in shipping freight over, and in receiving freight shipped over, the lines of said Railway Company within the State of Minnesota. These last named defendants represent a class of shippers so numerous that it is impossible to attempt to join them all as parties hereto; and said defendants are made parties hereto for the purpose of determining the rights as against the said Railway Company of all shippers un-

der the Acts and Orders, respectively, hereinafter set forth."

The defendants last named were certainly proper defendants and it was a proper case for bringing in, through them as representatives, the whole class of shippers and receivers of freight. The Court said in *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 390, and in *Missouri &c. Ry. Co. v. R. R. & Wh. Com.*, 183 U. S. 53, 59-61 (See also *C. & N. W. Ry. v. Dey*, 35 Fed. Rep. 866, 870, per Mr. Justice Brewer), that the State has no real interest in such a suit as this and, that stripped of all matters of form the only parties pecuniarily interested are the shippers and receivers of freight and the carriers. As the shippers and receivers of freight alone were the parties really interested as defendants and as to name and sue them all was an impossibility, they were properly sued by making defendants representatives of the class.

Mr. Story, in Equity Pleading, secs. 120, 121, 123, cites decisions abundantly sustaining this practice, saying:

> "The third class of cases already alluded to as constituting an exception to the general rule, as to parties, is, where the parties are very numerous, and although they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the court, and, on this account, they are dispensed with. In this class of cases, there is usually a privity of interest between the parties; but such a privity is not the foundation of the exception. On the contrary, it is sustained in some cases, where no such privity exists. How-

ever, in all of them there always exists a common interest, or a common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away. It is obvious, that under such circumstances, the interests of persons, not actual parties to the suit, may be in some measure affected by the decree; but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice. Indeed, in most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament, the court taking care that sufficient persons are before it, honestly, fairly, and fully, to ascertain and try the general right in contest.

"Thus, for example, bills have been permitted to be brought by the lord of a manor against some of the tenants, or *vice versa*, by some of the tenants on behalf of themselves and all the other tenants, against the lord, to establish some right; such, for instance as a bill with regard to suit to a mill, or a right of common, or a right to cut turf. In like manner, a bill has been permitted to be brought by the parson of a parish against some of the parishioners, to establish a general right to tithes, and the others have been bound by the decree made in the suit; and conversely, a bill has been permitted to be brought by some of the parishioners, on behalf of all, against the parson, to establish a parochial modus. So, where all the inhabitants of a parish had a right of common under a trust, a suit has been permitted to be brought by one, on behalf of himself and all the other inhabitants. In all these cases although there were, or might be, distinct interests in the different tenants or parishioners; yet there was a general right and privity between them, as to the claim, asserted in the bill; and, therefore, the suit was held

to be well instituted.

"Upon similar grounds, although by the general rule all the persons, whose estates are affected with a rent charge, should be made parties to a suit brought to enforce it; yet if some of them are unknown, or if they are very numerous, so that the rule becomes impracticable, or exceedingly inconvenient, the court will dispense with it; and the parties before the court will be left to seek contribution from the other persons in a new bill for contribution. Here, also, there is a privity between all the terre-tenants as to the rent charge, although their estates are, or may be, otherwise, several and distinct."

It is not perceived who else the plaintiffs could have summoned as defendants.

Therefore laying aside the Attorney General, and treating the case as if he had not been named as defendant, the Court had before it every party essential or proper to a complete hearing and decree upon every question raised by the bill.

The case in this condition went to a preliminary hearing upon the merits, the Attorney General participating and contending upon the merits (though we admit, objecting to the jurisdiction of the Court over him). The papers attached as exhibits to the petition show, that the Railroad Commissioners and two of the shippers made defendants also appeared in the suit, contended against the relief prayed and participated in all the hearings. Voluminous affidavits were heard, and upon the proofs the Court adjudicated, that the commodity rate act was shown to be *prima facie* uncompensatory and confiscatory (Petition, p. 125-6).

The interlocutory adjudication that the act was unconstitutional, being made with all necessary and proper parties before the Court and after notice and hearing, was for the time equally as valid and as much entitled to obedience as a final decree. It cannot be questioned that as to the Railway Company and as to the shippers it was conclusive until final hearing. They at least were bound to obey the decree.

The defendant railway company was enjoined not to obey the act of April 18. The shippers and the Attorney General were enjoined from proceeding in court to compel the defendant railway company to disobey this order. The allegation that the Attorney General threatened to proceed is proven to have been warranted by his since having done so.

The argument that he had a discretion to proceed or not to and that the court could not regulate or control his discretion begs the question: because if the Circuit Court had jurisdiction of the cause and of all the parties necessary to a decree, having made its decree, he had no discretion, but was bound to respect and obey it. *Board of Liquidation v. McComb*, 92 U. S. 531, 541. This question is, we submit, controlled by the language of the Court in *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 292 where Mr. Justice White said:

> "Indeed the proposition that the Eleventh Amendment, or Section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not

open for discussion. *Dietzsch v. Huidekofer*, 103 U. S. 494; *Prout v. Starr*, 188 U. S. 537; *Julian v. Central Trust Co.*, 193 U. S. 112."

The Court said in *Prout v. Starr*, 544-5, a case in every way similar to this except that the decree here is interlocutory, in that case final:

> "The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the *valid* criminal laws of the state, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood. * * * The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. *Peck v. Jenness*, 7 How. 612, 625; *Chittenden v. Brewster*, 2 Wall. 191; *Orton v. Smith*, 18 How. 263."

In *Julian v. Central Trust Co.*, p. 112, the Court said:

> "In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon v. Terry*, 36 Fed. Rep. 337, per Mr. Justice Field; *French v. Hay*, 22 Wall. 250; *Deitzsch v. Huidekoper*, 103 U. S. 494."

In *Sharon v. Terry* thus approved by this Court Mr. Justice Field discusses with his customary thoroughness the class of cases to which the principle

under discussion applies and shows, that whilst ordinarily cases involving the same matter may progress simultaneously in both the State and Federal Courts, yet that a court must protect its own jurisdiction, and that when a decree is rendered in the Federal Court compelling a party to do a certain act, of necessity no suit can be allowed to proceed in another court to compel that party to disobey the decree. In such suits as those for injunction and for specific performance of contracts, where the decree obliges the defendant to do or abstain from doing something, the necessity of preserving to the court its power to execute its own decree compels strict application of the rule, that the court first obtaining jurisdiction must retain the sole jurisdiction. *Wallace v. M'Connell,* 13 Pet. 143, 151; *Taylor v. Taintor,* 16 Wall. 366, 370; *Sharon v. Terry.*

No question is here made but that the Railway Company was properly enjoined to disregard the State statute. What is its position if it may be ordered tomorrow by a court of equal jurisdiction to do the contrary? To force it into this impossible position is to acknowledge the powerlessness of the Federal Courts to enforce their own decrees.

Suppose the decree in this cause were final, would the Attorney General, or indeed all the officers of the State, be allowed to proceed in the State Courts, either by mandamus or injunction, or by way of fines and penalties to coerce the railway company into disobedience? But if not, no more can such a

course be permitted at this stage of the case, for the decree here is just as valid and binding for the time being as a final decree. In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 114, the suit was by stockholders against the stock yards company to enjoin it from obeying a law of Kansas fixing its rates. The Attorney General was made a defendant. The Court decided (p. 113) that it had jurisdiction over the essential parties, namely, the stockholders and the corporation and its officers, and would therefore make a decree restraining the corporation from obeying the act of the legislature. It was said to be unnecessary to express any opinion as to jurisdiction over the Attorney General and the matter was solved by directing a dismissal as to him *without prejudice*. Supposing after this decree, he had commenced in the Courts of Kansas proceedings to compel the stock yards company to violate the decree, can it be doubted that this Court would have stopped such proceeding? The words "without prejudice" in the decree suggest how this Court would have answered the question.

Whilst injunctions are in one sense only binding upon the parties to a cause, still one who knows of an injunction, though not a party, will be punished for obstructing the course of justice by interfering with the execution of the decree, if he aids one who is a party in violating it. *Seaward v. Paterson*, L R. 1 Ch. 1897, 545; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *In re Lennon*, 166 U. S. 548, 554. *A fortiori*, the same principle applies where the defendant being willing to obey the decree a stranger

to the suit tries to force him to violate it.

The case in no way differs in principle from one where a court has taken possession of a fund. In such a case it is very clear that interference with the fund, whether by state officers or others cannot be tolerated. As the Court said in such a case *In re Tyler*, 149 U. S. 164, 190:

> "The stress of the argument, however, on behalf of the petitioner is placed upon the proposition that this proceeding is void, because it is in fact a suit against the State, and forbidden by the Eleventh Amendment. But this begs the question under consideration. The petitioner was either in contempt or he was not. This property was in the custody of the Circuit Court under possession taken in a cause confessedly within its jurisdiction, and if such possession could not be lawfully interfered with, the petitioner was in contempt. * * * The object of this petition was, we repeat, to protect the property, but even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that in our judgment it would not be obnoxious to the objection of being a suit against the State."

We therefore submit, that whether the Attorney General was, or was not, properly named defendant in the bill as originally filed, he was properly ordered not to interfere with the jurisdiction of the Circuit Court and not to interrupt the course of justice by attempting to take the very controversy once adjudicated by that court into the State Court, asking a contrary decision there. He was present at the hearings in the Circuit Court, was in that Court when the judgment was announced, was serv-

ed with the writ, which at least validly enjoined the railway company not to conform its tariff to the rates fixed by the Legislature (see his answer in the Circuit Court, Petition, p. 132-3). And consequently, even should it be conceded that he could not be made a defendant to the bill, still he was properly committed for interfering with the Court's valid decree. The Attorney General's authority and discretion as a state officer certainly do not extend so far as to warrant his interrupting and breaking up performance of decrees of the Courts of the United States. In so doing he certainly does not stand for or represent the State.

It should be noted that the procedure followed in the Circuit Court deprives neither the State nor the Attorney General of any right or remedy of value. Should the Northern Pacific answer in the State Court setting up the decree of the Circuit Court, and should the State Court proceed notwithstanding to render a judgment contrary to that decree, a writ of error would lie to this Court which could result in nothing but reversal. *Dupasseur v. Rochereau*, 21 Wall. 130, 134; *Crescent Live Stock Company v. Butchers' Union*, 120 U. S. 141, 146; *Factors' and Traders' Insurance Co. v. Murphy*, 111 U. S. 738; *Clements v. Berry*, 11 How. 398; *Ableman v. Booth*, 21 How. 506. The order complained of is therefore but a short road to an inevitable end.

The propositions we have suggested, if sustained, completely dispose of the case, leaving untouched

the main contention of the petitioner, that the Circuit Court had no jurisdiction to make him a party defendant. We insist that the Court had such jurisdiction, and that the suit is not made by joinder of the Attorney General a suit against the State. This question is fully and adequately discussed in briefs of my associates, and to add to their discussion seems unnecessary.

CHARLES W. BUNN,
on behalf of Wm. H. Grimshaw,
U. S. Marshal.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

BRIEF FOR THE UNITED STATES MARSHAL UPON ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT ISSUE.

WM. A. LANCASTER.
J. F. MCGEE.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 10 ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

A concise, and at the same time very clear and detailed, statement of the facts, will be found in the brief of Mr. C. W. Bunn, filed herein making it unnecessary for us to present more than a general statement of the facts.

The ultimate question to be determined in this case is whether the order of commitment under which the relator is in the custody of the United States Marshal for the District of Minnesota, is absolutely void, for want of jurisdiction in the Circuit Court to make it.

We shall address ourselves exclusively to the question of the proper construction of the Eleventh Amendment to the Constitution of the United States.

The Minnesota legislation, the validity of which is challenged in this proceeding, has no parallel

in the judicial or legislative history of this country.

It is unfortunate that this matter should be presented to this Court in the form in which it is presented, considering the stage the litigation has reached in the trial court; for the reason that, as presented, the Court can obtain from the record only a partial view of the situation—a condition of things always unsatisfactory, and never conducive to a proper understanding of the case.

Chapter 350 of the Laws of Minnesota for 1905 entitled "Joint Resolution relating to freight rates on (interstate) traffic," is as follows:

> "WHEREAS, The joint committee appointed January 11th to inquire into the question of freight rates, find that comparing the existing rates in this State with the rates in force in the States of Illinois and Iowa our people are paying much higher rates than are the shippers of the States named, which seem to be both from point of location, development and character of business, fair States with which to make comparison, and
>
> "WHEREAS, In the two States named they have but one tariff of rates which applies to or from all points, while the system which has grown up in this state provides:
>
> 1st. For a tariff known as the distributing tariff, which applies to and from all points recognized as distributing points.
>
> 2nd. For a tariff known as a distance tariff, which applies between all stations not terminals, the distance tariff usually bearing a higher rate than the distributing tariff. (These two apply to classified freights).
>
> 3rd. Are the Commodity tariffs, which in all cases carry a lower rate, and
>
> "WHEREAS, Each railway company issues in

the first instance its own tariffs, resulting, as shown by examination of the tariffs of the various roads, in a lack of uniformity both in the matter of the schedule of rates and the percentage in the class rates that each class bears to the first, and

"WHEREAS, The Railroad and Warehouse Commission is the proper tribunal and the only body properly equipped to undertake the work of securing an equitable, intelligent and fair readjustment of the rate situation in this State.

"NOW THEREFORE, BE IT RESOLVED, By the Senate, the House concurring: We recognize the prevailing conditions which seem to warrant the existence of a distributing and a distance tariff, and believe that in maintaining a distributing tariff it is possible to provide not only several points in the State which are valuable to the people as sources of supply but afford a home market for our products. We believe, however, the two tariffs should show but little difference in the rate for a given mileage —in no case should the difference exceed five per cent.

"RESOLVED FURTHER, The Railroad and Warehouse Commission is hereby directed to undertake the work of securing a readjustment of the existing freight rates in this State, which will give a more uniform system of rates throughout the State and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates.

Approved April 14 1905."

Whether freight rates in the State of Minnesota showed a lack of uniformity, and a necessity existed for a readjustment of the same, as stated in the resolution of April 14th, 1905, are questions

which it is neither proper nor possible to discuss on the record which is before this Court; but we may be permitted to suggest that from the year 1887 to the present time the Railroad and Warehouse Commission of the State of Minnesota has been by law charged with the duty of supervising to a large extent the operation of the railroads in the State, fixing rates and correcting inequalities; and that it exercised that power without stint, the records of this Court and of the Supreme Court of the State abundantly show.

Chapter 10, *Laws of Minnesota*, 1887.

Chapter 106, *Laws of Minnesota*, 1891.

Chapter 28, *Revised Laws Minnesota*, 1905.

C. M. & St. P. Ry. Co. v. Minn., 134 U. S. 418.

Minneapolis Eastern Ry. Co. v. Minn., 134 Minn. 467.

Wisconsin, Etc. R. R. Co. v. Jacobson, 179 U. S. 287.

Minneapolis & St. Louis Ry. Co. v. Minn., 186 U. S. 257.

Minneapolis & St. Louis R. R. Co. v. Minn., 193 U. S. 53.

State of Minn. ex rel. Railroad and Warehouse Commission v. C. M. & St. P. Ry. Co., 38 Minn. 281.

Steenerson v. G. N. Ry. Co., 69 Minn. 353.

Jacobson v. Wisconsin, Etc. R. R. Co., 71 Minn. 519.

State ex rel. R. & W. Commissioners v. M. & St. L. R. R. Co., 76 Minn. 469.

State ex rel. Railroad and Warehouse Com-

mission v. Minneapolis & St. Louis R. R. Co., 80 Minn. 191.

State ex rel. Railroad and Warehouse Commission v. M. & St. L. R. R. Co., 87 Minn. 195.

State ex rel. Railroad and Warehouse Commission v. N. P. Ry. Co., 90 Minn. 277.

The resolution of April 14th, 1905 above quoted, particularly in its "whereases" is worthy of notice.

The first "Whereas" recites that there is a lack of uniformity in the matter of the schedule of rates, and the percentage in the class rates that each class bears to the first; which is followed at once by the second "Whereas," to the effect that the "Railroad & Warehouse Commission is the proper tribunal and the only body properly equipped to undertake the work of securing an equitable, intelligent and fair readjustment of the rate situation in the State"; apparently overlooking the fact that the body so equipped with intelligence and fairness, had, at the date of the adoption of the resolution and for eighteen years prior thereto, ample and complete power to correct any such lack of uniformity, if it existed; which would lead in the direction of the conclusion that that body, certified by the Legislature to be equipped with intelligence and fairness, had entirely failed to discover any such condition in the railroad situation in the State of Minnesota as that suggested in the "Whereas" mentioned.

The first resolution recognizes what it terms "pre-

vailing conditions," and resolves that those conditions warrant the existence of a distance and distributing tariff; and records the belief that in maintaining a distributing tariff it is possible not only to provide several points in the State which are available to the people as sources of supply, but to afford a home market for "our products."

It then proceeds to express the belief: "however, the two tariffs should show but little difference in the rate for a given mileage—*in no case should the difference exceed five per cent.*" Which, to say the least, was not very complimentary to either the intelligence or the ability of the Railroad and Warehouse Commission.

The last resolution directs the Railroad and Warehouse Commission to undertake the work of securing a readjustment of existing freight rates in the State, which will give a more uniform system of rates throughout the State, and a uniform scale of percentages which each class rate shall bear to the first class; *the readjustment to secure a substantial reduction in existing merchandise rates.*

Whether an examination of the rate situation would develop that the merchandise rates were perfectly fair, or too high or too low, seemed apparently unimportant when the resolution was adopted; because the Railroad and Warehouse Commission is told in positive terms, to proceed to readjust existing rates, and in doing so to make a substantial reduction.

The adoption of this resolution was but the prelude to the order of the Railroad and Warehouse

Commission and acts of the Legislature to which we shall call attention.

The annual report of the State Railroad and Warehouse Commission covering the year 1906, a public record of which we assume this Court will take judicial notice, states that:

> "On August 18th, 1906, the Commission received a joint application from the Great Northern, Northern Pacific and Soo Line railways for permission to reduce their rates on grain in Minnesota, approximating 10 per cent, to the terminals from points more than fifty miles distant from the terminals, taking effect September 1st, 1906.
>
> "On August 20th, 1906, the Commission advised the companies, granting authority to make the reductions and to put in the rates as outlined above, with the understanding that said reductions would in no way interfere with the pending investigation by the Commission as to the reasonableness of the grain rates in this State.
>
> "Tariffs were filed showing the reduced rates, and the same became effective September 1st, 1906 (See pages 28 and 29).
>
> "On September 15th, 1906, application was received from the Northern Pacific and Soo Line railways, respectively, asking the consent of the Commission to reduce the rates on hard and soft coal from the terminals of Duluth, Minneapolis, St. Paul and Minnesota Transfer to points in Minnesota, which was granted on September 18th, 1906, with the distinct understanding that said reductions would in no way interfere with the pending investigation by the Commission as to the reasonableness of the coal rates in this State.
>
> "The Great Northern Railway Company was party to this agreement, but did not file an application on account of their business being

interstate.

"The tariffs were filed with the Commission showing the reduced rates, and went into effect on October 22nd, 1906. (See page 29).

"Although the annual report usually includes no record beyond the 30th of November (the date for closing each year's report), the issuance of their order on December 14th, 1906, by the commission, reducing commodity rates has prompted them, in view of its importance, to include it in this report. The Commission has also prepared a brief report of its labors under Chapter 350, General Laws of 1905, which is hereto appended and will be submitted to the Legislature at its forthcoming session.

"To the Senate and House of Representatives of the State of Minnesota:

"Gentlemen—The Railroad and Warehouse Commission would respectfully report briefly the results of the work accomplished under Chapter 350, General Laws of 1905, being the joint resolution requesting the Commission to take up the question of reasonable freight rates in the State of Minnesota, particularly the class rates.

"A careful investigation into the question has been made to determine the reasonableness of rates, both class and commodity, and also to find what seems to be the fairest plan to adopt in making a schedule of rates both as to railway companies and the people, resulting in an order made September 7th, 1906, reducing class rates from twenty (20) per cent to twenty-five (25) per cent. This order became effective November 15th, and has been accepted by the railway companies, and the people of the State are now enjoying the benefits from the same.

"On December 14th, 1906, a second order was made reducing commodity rates on the principal agricultural products, including coal and lumber. The reduction averaged from ten

(10) per cent to twenty-eight and one-half (28½) per cent, the percentage of reductions varying on the different commodities *and is in addition to the reduction made on coal and grain in November last.* This order will be effective January 26th, 1907, and will result, in the opinion of the Commission, not only in a great saving to the people of the State in freight charges, but also in securing to the people a schedule of rates which is equitable and fair to all parts of the State, and will remove all grounds for reasonable cause for complaint of discrimination between localities, the aim being to give all a fair show.

"The full benefits to the public can only be appreciated by a careful and thorough examination of the new schedules—comparing them with the old ones."

It will be noticed that the legislature by Chapter 350, General Laws of 1905, undertook to direct the course that should be adopted by the Railroad and Warehouse Commission, and practically commanded that that course be followed.

The Railroad and Warehouse Commission proceeded to obey instructions, as shown by their Annual Report covering the year 1906.

The above quoted portion of the Report shows a voluntary reduction in grain and coal rates in August and September, 1906, which that Report shows was a reduction "approximating ten per cent" in the grain rates; and on the hearing in the Court below it appeared that the reduction in the coal rates was from five to twenty-five cents per ton.

The order of September 7th—referred to throughout this litigation as the order of September 6th—which became operative November 15th, 1906, made

a reduction of from twenty to twenty-five per cent in rates on all classified freight (Record, p. 126), which schedule of rates was put into effect by the railroad companies on November 15th, 1906, and has been in effect since that date.

This was followed by the order of the Commission of December 14th, 1906, reducing the rates on the principal agricultural products, including coal and and lumber from 10% to 28½%, and was in addition to the voluntary reduction on grain and coal before mentioned.

The two orders mentioned covered all classes of freight moved by the railroad companies.

The railroad companies refused to recognize the order of December 14th, 1906, making a reduction in the rates on the principal agricultural products, and on the 24th day of January, 1907, filed bills in the Federal Circuit Court for the District of Minnesota, against the Railroad and Warehouse Commission, alleging facts showing that the schedule of rates of December 14th, 1906, was confiscatory in its operation, and would deprive the corporations of their property without due process of law and would deny to them the equal protection of the laws; that the same amounted to an unlawful interference with interstate commerce; and for the reasons stated and each of them, the order was unconstitutional and void.

On the day the bills were filed an order was issued in each case requiring the Commission to show cause before the Court on February 13th, 1907, why a temporary injunction should not issue; and an

order was made, restraining the Commission in the meantime from putting the order of December 14th, 1906, into effect. No subsequent step was ever taken in that litigation, owing to the legislation to which we shall now refer.

The suits were brought against the Commission on the theory that it was an administrative body, charged with the duty of fixing rates, and enforcing the same.

The Legislature was then in session; corporation baiting was the order of the day; and the granting of the restraining orders by the Circuit Court presented a splendid opportunity to vent legislative rage upon the railroad companies.

The limits of legislative authority in rate matters had been debated back and forth before the Commission and the Railroad Committees of both Houses, and the members of those committees were familiar with the limitations upon their power, and undoubtedly were familiar with the declaration of this Court in *Smyth v. Ames*, that a reduction of 29½% was, *prima facie*, confiscatory.

A bill was introduced in the Legislature, reducing passenger rates in the State from three cents to two cents per mile—a reduction on its face of 33 1-3%—which became a law on April 4th, 1907, and according to its terms took effect May 1st, 1907, and has since been in effect and obeyed by all the railroad companies. It appears in full on page 33 of the Record.

Of the characteristics of this bill we shall speak later.

A bill was also introduced, classifying commodities, and prescribing a schedule of rates therefor, which bill appears in full on pages 27 to 33 of the Record herein, and became a law April 18th, 1907.

The Railroad and Warehouse Commission reported to the Legislature that the commodity tariff of December 14, 1906, effected a reduction as high as 28½% in existing tariffs.

The legislative tariff of rates on commodities under the act of April 18, 1907, reduced existing rates somewhat less than the Commission's schedule of December 14th, 1906.

That is, the Legislature, advised by the proceedings taken in the Circuit Court against the Commission's order of December 14th, 1906, that a reduction of rates on commodity freight would probably be resisted, did not venture to make so severe a cut as that made by the Commission.

The extent of the reductions in both the passenger and commodity rates was such as to suggest at once the difficulty of sustaining them in the courts; and that difficulty is supposed to have been overcome by the provisions of sections 5 and 6 of the commodity act and section 2 of the passenger act, which, for ferocity and enormity of the penalties prescribed, have no parallel in the history of this or any other civilized country.

Having determined to put into effect passenger and freight rates so low that in all probability the courts would afford relief against their enforcement, the question to be determined was, how such a plan could be successfully carried out; and the

conclusion was apparently reached—it was the only one that could have been reached—that to accomplish such a vicious purpose necessarily required the aid of legislation equally vicious to carry it into effect, and which would close the doors of the courts to the railroads and their stockholders. These provisions are found, as stated, in section 2 of the passenger act (Record, p. 33), and sections 5 and 6 of the commodity act (Record, pp. 29, 30).

This Court apparently laid down the rule in *Fitts v. McGhee*, 172 U. S. 516, that state officers who are specially charged with duties in connection with the enforcement of state laws may, if those laws are alleged to be unconstitutional, be made parties to a suit in equity to enjoin the enforcement thereof; but if not so charged they cannot be made parties to such a suit.

This rule supposed to have been laid down in *Fitts v. McGhee* suggested (and political cunning was not slow to adopt the suggestion), that if the Railroad and Warehouse Commission was stripped of all duty connected with the enforcement of the law, by the provisions of the act itself, that would prevent the railroad companies from making the members of the Railroad and Warehouse Commission parties to a bill in equity to enjoin the enforcement of the rates; and would, at least from that direction close the doors of the courts to the railroad companies.

The plan was adopted. Section 5 of the commodity act (Record, p. 29), provides:

> "This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that *no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State.*"

That the State, *eo nomine*, could not be made a party to such a suit, because of the provisions of the Eleventh Amendment, was assumed to be unquestionable; and it apparently was also assumed that behind the Eleventh Amendment, as that Amendment is supposed by the relator to have been construed in *Fitts v. McGhee*, would be found a safe hiding place for the relator and other officers of the State.

In other words, it having been taken for granted that the Eleventh Amendment made it impossible to make the State, *eo nomine*, a party, and that the above quoted provisions of section 5 of the commodity act made it impossible to make the members of the Railroad and Warehouse Commission parties, it was concluded that the doors of the courts were effectually closed to the railroad companies, and that the scheme of preventing access by litigants to the courts to test the reasonableness of rates alleged to be confiscatory, which Minnesota by her Legislature in 1887 attempted, and which it became the duty of this Court to destroy—(*C. M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *Minneapolis & Eastern Ry. Co. v. Minnesota*, 134 U. S. 467)—had been improved upon and made proof against the equity powers of the Federal Courts.

There remained the possibility that the law might not be obeyed, and that it might be possible to question its validity in a criminal proceeding; and that avenue of approach to the courts was closed by the barbarous provisions of section 2 of the passenger act and section 6 of the commodity act.

Section 6 of the commodity act provides that:

> "Every railroad company transacting the business of a common carrier within this State, shall adopt and publish and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its lines of railroad in this State, of the commodities named in this act; and every officer, director, traffic manager or agent or employee of such railroad company, exercising any authority or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by said railroad company of rates not exceeding those specified in this act; and any officer, director or such agent or employee of any such railroad company who violates any of the provisions of this section *or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section* shall be guilty of a misdemeanor and may be prosecuted therefor *in any county into which its railroad extends, and in which it has a station*, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days."

It will be noticed that the provisions of section 6 reach even the attorneys for railroad companies if they should perchance, in good faith, advise against putting the rates into effect, because such rates are non-compensatory or confiscatory; and under its provisions any officer of a railroad from

the president to the station agent, can be taken to the most remote part of the State in which the railroad company has a station, and there be tried, and if convicted, there is only one punishment prescribed, and that is imprisonment in the county jail.

The usual plan of prescribing a fine as an alternative to imprisonment was omitted, it being assumed, apparently, that with the certainty of the jail confronting them, there would be obedience to the law by the persons enumerated in section 6; and of course, as long as there was obedience to the law the question of the reasonableness or validity of the rates could not be determined in a criminal proceeding, if it could in any event be tested in that way.

See *C. M. & St. P. Ry. Co. v. Minnesota,* 134 U. S. 418, 460.

Station agents would naturally look to the traffic department for instructions as to rates, with the commodity act on the statute books and its drastic penalties staring them in the face.

The traffic department, in turn, would naturally, under like circumstances, look to the legal department; but in this instance—and we think it is the first instance that will be found upon the statute books of any civilized country in the world—the legal department must remain dumb, and the lawyer can only advise his client at the risk of a term in the county jail, if the conclusion reached by him is that the law is invalid, and he so advises.

TURNING NOW TO SECTION 2 OF THE PASSENGER ACT.

By its terms, if a station agent sells a ticket from one station to another six miles distant at the rate of three cents per mile, instead of the statutory rate of two cents—in other words, charges six cents more than the amount prescribed by the passenger act—and collects the money, in good faith, acting upon the instructions of his superiors in the traffic department, and the honest judgment of the legal department of the corporation, he is, by the terms of section 2 of the passenger act, denounced as a felon, and subject to imprisonment in the penitentiary for a term of five years or to the payment of a fine of five thousand dollars, or both.

These barbarous penal provisions, it was assumed, would preclude the possibility of any violation of the act, which, as we have said, would preclude the possibility of a test of the reasonableness or validity of the rates, if that were otherwise possible in a criminal proceeding; and the State and its officers having gone into hiding behind the provisions of the Eleventh Amendment, as that Amendment is supposed by the relator to have been construed by this Court in *Fitts v. McGhee,* the salutary provisions of the Fourteenth Amendment were supposed to have been successfully and effectually emasculated.

The relator, as attorney general of the State, as appears by the record of the House of Representatives in the proceedings of the 73rd day of its session, April 19th, 1907, (the day after the passage of the commodity act), announced to the Legisla-

ture the consummation of the scheme which we have described, and in doing so, said:

> "I have been informally notified today that the litigation between the State and the several railroad companies as to commodity rates will be dropped, and that the companies will comply with both commodity rate and the two-cent fare bill. *This result has been brought about largely by reason of the passage of the recent commodity rate bill introduced by your committee, which so safeguarded the rights of the State as to make successful resistance thereto by the railroad companies a matter of difficulty.*"

We call attention to the commodity act referred to by the relator in his communication to the Legislature.

It appears upon pp. 27 to 33 of the Record.

We ask that it be examined with a view to determining what the relator referred to as the provisions "which so safeguarded the rights of the State as to make successful resistance thereto by the railroad companies a matter of difficulty."

Section 1 places the various commodities covered by the bill in six classes.

Section 2 of the act establishes a schedule of what are termed "reasonable maximum rates."

Section 3 refers entirely to the same subject.

Section 4 prohibits any common carrier of property within the State of Minnesota from taking or receiving any greater sum for carrying within the State any commodity named in the act, than the amounts set forth and provided for in section 2 of the act for the respective distances therein

named.

It will thus be seen that the first four sections of the bill contain no provisions whatever that "safeguard the rights of the State, so as to make successful resistance thereto by the railroad companies a matter of difficulty."

But an examination of sections 5 and 6 clearly discloses what the relator in his communication to the Legislature had in mind.

Section 5 contains the provision suggested by the language of the opinion in *Fitts v. McGhee*, declaring that "no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State."

Section 6 contains the penal provisions to which we have adverted, while there is a beneficent provision in section 7 that if when the act takes effect a railroad company has a rate between any stations in the State less than that prescribed by the act, the act shall not be construed as authority for raising the rate to that prescribed under the act.

It is submitted that it is thus made perfectly plain what was in the mind of the relator when the communication referred to was addressed by him to the Legislature; practically congratulating the Legislature upon the successful consummation of the scheme to launch this unconstitutional legislation, made, as it was supposed, impervious to judicial action.

After a trial lasting from the 3rd to the 20th day of September, 1907, before a Judge of great ability

and large judicial experience, it was found upon the showing made that the commodity act prescribed rates so low as to bring the act itself within the prohibitions of the Fourteenth Amendment against depriving any person of his property without due process of law, or denying to any person the equal protection of the laws; and a temporary injunction was awarded, which the relator—assuming that the scheme adopted to prevent "successful resistance" by the railroad companies would work out—violated—by commencing a mandamus proceeding in the State court to compel the defendant Northern Pacific Railway Company, to do that which the injunction of the court below enjoined it from doing.

In proper proceedings taken before the Circuit Court the relator was adjudged to be in contempt in thus violating the injunction. A fine of one hundred dollars was imposed, with the alternative of imprisonment in default of payment.

The relator failed to pay the fine and was imprisoned, and by this proceeding seeks to regain his liberty.

We may add that the merchandise order of September 6th, having been in operation from November 15th, 1906, and the passenger act having likewise been in operation from May 1st, 1907, the trial court, conceiving the function of a temporary injunction to be to maintain the *status quo*, declined, pending the final hearing of the cause, to award a temporary injunction against the rates prescribed by such order and act, because the effect of such

injunction would be not to maintain but to change the *status quo.*

In awarding the temporary injunction against the commodity act, the learned Circuit Judge said:

> "There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any Legislature which could enact provisions of that kind. In case of the refusal to issue a ticket at a certain rate which is fixed by the Legislature as proper, but which the railroad companies hold to be void and unconstitutional (and which would be an act of itself not immoral nor *malum in se*, but would ordinarily afford the person who was refused the privilege of a ticket a right of action against the railroad company), in case he was in the right and the refusal was wrong, there would be no question but that in a civil action any such person would receive an adequate remedy; there would be no danger that any court or jury would refuse to give ample damages. Beyond question, the result of actions of that kind would be that the damages would almost certainly border on the excessive, instead of failing to remunerate the party for any wrong he would suffer on account of such a refusal. But under the provisions of these laws, acts not immoral or wrong in themselves, but which are only unlawful because prohibited, would entail upon the person refusing to comply with such laws the position of being convicted of a felony. They make the refusal a felony, and impose a punishment very unusual —a fine that might be to the amount of $5,000, or imprisonment in the state prison to the extent of five years, or both, in the discretion of the court; punishments which are applied only to the very highest crimes short of homicide of which men are ever guilty; punishments which would be deemed adequate in cases of bur-

glary, highway robbery, or crimes of the highest character, short, I say, of homicide."

In the case of *Cotting v. Kansas Stockyards Co.*, 183 U. S. 79, Mr. Justice Brewer, who delivered the opinion of the Court, in discussing this phase of the question, said:

"It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the state courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no doubt as to the construction? Is there not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the State, and the construction of a state statute by the Supreme Court of the State is in a case like this conclusive upon us? Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. *In this feature of the case we are brought face to face with a question which legislation of other States is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon failure to make good that claim or defense, the penalty for such failure either appropriates all of his property, or subjects him to extravagant and unreasonable loss?* Let us make some illustrations to sug-

gest the scope of this thought.

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty, then even, if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant), which places upon him as a penalty for a failure to make good his claim or defense, a burden so great as to practically intimidate him from asserting that which he believes to

be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stockyards company a criminal offense, and simply imposes punishment for such offense; that it is within the competency of the Legislature to prescribe penalties for all offenses, either those existing at common law or those created by statute; and, further, that although the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties, for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation whose assets amount to millions would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and, if extreme and cumulative penalties are imposed, only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In *Ex parte Wood*, 155 Fed. 190, a case in which the law so far as the penalties imposed were concerned, was less barbarous, but in which the same spirit which seems to be abroad, a spirit of corpor-

ation baiting, combined with political anarchy, was manifested, Judge Pritchard said, at page 191:

> "There was nothing unusual in the proceedings instituted by the several railroad companies in the State. Similar suits have been instituted in the State of Alabama, where Judge Jones issued an injunction, and also in the State of Georgia, where Judge Newman pursued the same course. Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the superior courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and its officials be sent before the grand jury in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the State, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by this Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the injunction which was granted by the court, and to practically defeat its jurisdiction. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests, taking place in widely separated portions of the State, present serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writs of habeas corpus into the legality of arrests, and this seems to be the deliberate policy of those representing the

State. The court does not wish to be understood as imputing improper motives to the Governor or other state officials. *The penalties prescribed by the state statute for charging more than the statutory rates are so enormous that, if permitted to be enforced, they would practically bankrupt the railroad in an exceedingly brief time, and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert a right which is guaranteed to it by the Constitution of the United States. If the criminal prosecutions against the agents, conductors and employees are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business.* * * Notwithstanding the plain provisions and enactments contained in the Constitution and Revised Statutes of the United States as well as the State Constitution and the statutes of the State, it is seriously contended that the agents of the complainant in this instance, when indicted for the violation of the statute (the enforcement of which has been restrained by this court), are not entitled to a remedy which is afforded to every other citizen of the State. * * *

"If the contention of the counsel representing the State be true, then this Court can be deprived of its jurisdiction by the multiplication of criminal prosecutions in the state courts against the complainant, its agent and employees to such an extent as to finally place it in a position where it will be deprived of a larger amount than that which is involved in the original controversy, and thus, by indirection, the complainant will be denied a right which is guaranteed to it by the Constitution of the United States. This proposition is inconsistent with the well-established rules of judicial procedure, and does not commend it-

self to this or any Court sitting as a court of equity. It excludes the idea of comity between the courts of concurrent jurisdiction. * * *

"The foregoing section, among other things, provides that the company or its agents shall pay a penalty of $500 for each failure to comply with the requirements of the act. It has been held that no state can constitutionally close the doors of the courts to a judicial inquiry into the constitutionality of the rates it fixes. In the case of *Railroad Company v. Minn.*, 134 U. S. 456, 10 Sup. Ct. 702, 33 L. Ed. 970, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive, and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial investigation into the validity of the rates. If this cannot be accomplished directly, it cannot be done indirectly. It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore any system of penalties which is intended to have the effect and which is so framed as to have the effect of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section 4 of the act in question clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the court, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts so as to make it, if the penalties were valid, practically impossible for such an appeal to be made."

Judge Pritchard here embodies in his opinion the above quotation from the *Cotting case* and then continues:

> "The evidence shows that one case under this provision of the act has already been tried in the Superior Court of Wake County against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of $30,000 against the company, and notified the agent that, if he would stop selling tickets at a price that was authorized by the decree of this court, the judge would impose a nominal punishment, but, if he did not, the Court would not say what it would do until it had received an answer. In making this reference the Court not does wish to be understood as criticising the state court, for there is no one in the State for whom the Court entertains a higher regard than Judge Long. It is also shown by the uncontradicted evidence in this case that at least 5,000 tickets are sold daily by complainant at its various offices in the state, in its intrastate business, thereby making it possible for it to be sued 5,000 times in one day for penalties amounting to $500 in each instance on account of its failure to comply with the statute fixing passenger rates. Thus it will be seen that by an enforcement of the statute judgments can be obtained against the complainant for the sum of $2,500,000 for each day. The aggregate penalties for which judgment could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit would be for one year."

See also *Southern Ry. Co. v. McNeill*, 155 Fed. 756.

The case of *Consolidated Gas Co. v. Mayer*, 146 Fed. 150, was a proceeding in equity to enjoin the

enforcement of a schedule of rates for gas.

In disposing of the case Judge Lacombe said, at page 153:

> "In the act which provides that companies furnishing gas in the borough of Manhattan 'shall not charge or receive for gas manufactured, furnished or sold a sum per 1,000 cubic feet in excess of 80 cents,' we find the following:
>
> 'Sec. 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of $1,000 for such offense to the people of the State.'
>
> "The drastic character of these provisions will be perceived when their results are considered. If the gas company, pending the final determination of a suit such as this to determine whether the Legislature has fixed a just and proper price, should charge its consumers the lower rate, and receive the same without protest or demand of payment at the higher rate, it could never recover the difference, even should it be decided by the court of last resort that it was entitled to demand such higher rate. Having delivered its product for the particular month, and received the amount it asked for such product, that transaction would be finally closed. Both parties having agreed upon the price, without any reservation, it would be the contract price for that month's delivery, which the seller could not thereafter dispute. If it should take two or three years to get a final decision on the merits the 20 cents difference of rate, all claim to which during the interim the company had thus abandoned, would concededly amount to several millions of dollars. Should the company ultimately prevail in the test suit, this would be an enormous fine to pay for the privilege of having its day in court. It could escape that fine only by demanding, on presentation of each monthly bill, payment at the higher rate, preserving its claim to the difference, whenever the lower rate was paid and

received, by a protest, which would reiterate the demand. The statute (Chapter 737, p. 2092, Laws 1905), undertakes effectually to close up that avenue of escape.

"Ordinarily, when there is a dispute between seller and buyer as to the rate to be paid for anything, the question is settled by the seller bringing suit for the price of what he has sold calculated at the higher rate. The statute, however, practically undertakes to debar the company from bringing any such suits against its customers. The twenty-first section (quoted, *supra*), provides that if in any action brought to collect any charge for gas it shall appear that a price has been demanded in excess of the rate fixed by the gas commission or by statute, that fact shall be a complete defense to the action—to the whole action—not only to so much of it as seeks to collect the excess, but also to so much of it as seeks to collect the amount concededly due. Now, whenever the seller of anything verifies a complaint to be used in an action at law, which asserts that he is entitled to receive and asks to recover a sum of money, he may fairly be said to be preparing to make a demand therefor; and the moment he serves such complaint upon the buyer he has indisputably made such demand. But the statute says that the mere making of such a demand shall constitute a complete defense; in other words, if the statute is valid, the cause of action which the plaintiff may think it has, is slaughtered at the very moment it sets foot within the halls of justice. The merits of the controversy as to what rate should be charged will never be litigated in that action, because no defendant would be so foolish as to discuss any such issue, when the mere fact that action is brought relieves him from all payment whatsoever.

"The only course left for the gas company is to bring some direct suit, such as this, to test the constitutionality of the action of the

gas commission and of the Legislature in fixing an 80-cent rate, and meanwhile to preserve its rights to the difference by demanding payment thereof, as each monthly bill is presented to each consumer. To close up this avenue of approach to the courts, however, the other act (Chapter 125 of 1906), provides that, whenever a manufacturer and seller of gas in the Borough of Manhattan shall charge or receive anything in excess of 80 cents per 1,000 cubic feet, it shall for each offense forfeit $1,000 to the people of the State; and section 1962 of the Code of Civil Procedure makes it the duty of the defendants, the Attorney General, and the District Attorney to institute suits for recovery of such penalties. Every time the company demands payment for gas furnished at the higher rate, every time it receives such payment from any consumer who may be willing to pay temporarily, and abide the result of the test suit, it incurs such a penalty. For very many years it has been the custom in this borough to present monthly bills for gas sold, and it appears from the Record that the complainant has upwards of 390,000 customers. The calculation is a simple one. Long before this test suit could be heard next fall, the aggregate of the penalties incurred would utterly wipe out the entire property of the complainant, whether it were worth the amount found by the gas commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it."

Judge Lacombe here quotes at length, from the opinion of Mr. Justice Brewer in the *Cotting case* and then continues:

"It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City Stock Yards case, except that they are perhaps more drastic. On this branch of the

case there is no controversy as to the facts, and under the opinion last quoted, these provisions seem obnoxious to the Fourteenth Amendment to the Constitution of the United States. In order, therefore, to secure to the complainant its right to prosecute this suit to its orderly conclusion, without meanwhile being trammeled—or, as it may be more appropriately expressed, overwhelmed—by multitudinous actions for cumulative penalties, the temporary injunction which restrains the public officers, who are made defendants, and any one else whom the injunction may reach and hold, from enforcing, or attempting to enforce, the provisions of the acts and order of the gas commission against the complainant, will be continued until final hearing and decision of the cause in this Court."

OUR CONTENTION IN THIS MATTER IS:

FIRST: That the facts in the case at bar take it entirely out of the rule that is supposed by relator and his counsel to have been announced in *In re Ayers* and in *Fitts v. McGhee*.

The cases cited are those mainly relied upon by the relator to sustain the position taken by him in this matter.

That the cases, if sound, are clearly distinguishable from the case at bar we think is very clear.

In *In re Ayers*, the plaintiffs had no standing before the Court, and their bill was bad for want of equity—they were not taxpayers and had made no tender of coupons in payment of taxes, so that if all that was claimed in the bill were true, they could not claim to have been, in a legal sense, injured.

See *Marye v. Parsons*, 114 U. S. 325.

They were speculators who bought Virginia coupons for the purpose of profiting by a resale of them to taxpayers in Virginia and their complaint was that the legislation of Virginia, complained of in their bill, had the effect of depressing the market so that their profits on resale of the bonds and coupons were not proving to be as large as they had anticipated.

The relief sought in the main case was that the Attorney General and the solicitors for the different counties of the commonwealth of Virginia be enjoined from bringing suits in the name of the State of Virginia, as they were required to do by the express terms of certain acts of the Legislature of Virginia against delinquent tax payers to recover delinquent taxes.

Treating the case as this Court did, as one to compel specific performance by the State of its contract with the coupon holders, it is clearly within the doctrine of the class of cases in this Court holding that the suit being one in which the decree if passed would require *affirmative* action on the part of the State was in fact a suit against the State and within the inhibition of the Eleventh Amendment.

Louisiana v. Jumel (1882) 107 U. S. 711, 721, 728.

Cunningham v. Macon Etc. Ry. Co., (1883) 109 U. S. 446, 455.

Hagood v. Southern, (1886) 117 U. S. 52, 70.

Smith v. Reeves, (1900) 178 U. S. 436, 445.

That this Court treated the case as stated is apparent from the opinion (pp. 502, 503), viz.:

> "A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. In *Hagood v. Southern*, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the Court was without jurisdiction, because it was a suit against the State.
>
> "The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. *Such is the precise character of the suit in the Circuit Court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.*
>
> "It may be asked what is the true ground of distinction, so far as the protection of the Constitution of the United States is invoked, between the contract rights of the complainant in such a suit, and other rights of person and

of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

"The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the Eleventh Amendment, which secures to the State an immunity from suit."

That *In re Ayers* lends no support to the contention of relator in this proceeding must be perfectly apparent.

The case of *Fitts v. McGhee* is relied upon by relator, as affirming two propositions of law, both of which he seeks to maintain in the pending proceeding:

A.

That a State officer not specially charged by law with the duty of enforcing a statute, alleged to be in violation of the Fourteenth Amendment, in that it deprives a person of his property without due process of law and denies to him the equal protection of the laws, cannot be made a defendant to a suit in equity by the person whose rights are thus infringed, to enjoin the enforcement of such unconstitutional statute—that such a suit, though not in form, would, in fact, be a suit against the State, within the meaning of the Eleventh Amendment.

B.

That in the case stated above, equity cannot take jurisdiction because the person whose rights are invaded in the respects stated, has an adequate remedy at law, in that, when put upon his trial under an indictment for violating the law, he can interpose the defense that the statute is unconstitutional.

Our answer to the relator's contentions thus stated, is, first, that *Fitts v. McGhee* is clearly distinguishable from the case at bar, in that the relator as Attorney General of the State of Minnesota is specially charged with the duty of enforcing the provisions of the order of the Commission of September 7, 1906, the passenger act of April 4, 1907, and the commodity act of April 18, 1907; and, second, that under the facts in the case at bar, the

unconstitutionality of the order and the two acts mentioned could not be interposed as a defense to an indictment for violating the same; and, third, that the case of *Fitts v. McGhee*, whether distinguishable or not, is unsound and ought to be overruled.

The general powers of the Attorney General are very extensive as will appear by reference to an opinion of the Supreme Court of Minnesota, filed on June 7, 1907, in the case of *State ex rel. Young, Attorney General v. Robinson,* 112 N. W. Rep. 269.

In that case the Court said, at page 272:

> "In view of this attitude of the Legislature, and its evident purpose of re-establishing the supreme authority of the State in reference to this subject, the contention that the Attorney General has no authority to prosecute the action does not require extended discussion. The office of Attorney General has existed from an early period, both in England and in this country, and is vested by the common law with a great variety of duties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the Legislatures of the States of this country to attempt specifically to enumerate them. Where the question has come up for consideration it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at the common law. *State v. Kent*, 96 Minn. 255; 104 N. W. 948; 1 L. R. A. (N. S.) 826; 4 *Cyc.* 1028; *Hunt v. Railway Co.*, 20 Ill. App. 282; *Parker v. May*, 5 Cush. (Mass.) 336; *People v. Minor*, 2 Lans. (N. Y.) 396; *People v. Tweed*, 13 Abb. Prac. (N. Y.) 25. From this it follows that, as the chief law officer of the State, he may, in the absence of some express

legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. We have no statutory restrictions in this State. The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General upon the same subject. We have numerous instances where particular duties are expressly imposed upon the County Attorney, yet it is clear that the Attorney General has the right, in virtue of his office to cooperate with or act independently of that official in all cases where the public interests justify it. The purpose of this statute was not to confer special exclusive authority upon the County Attorney, but rather to require of him the performance of an existing official duty. The authority to conduct proceedings there required to be brought is incidental to his office, and the statute was in effect but a command of the State to perform his duty. If the command thus made were to be held a vesting of exclusive authority, then with equal propriety it could be held that the duty imposed by the same statute upon mayors and other municipal officers to make complaint of known violations of the statutes would necessarily preclude complaints by others. The reason for so holding would apply with the same force to both cases. But that is not the law; and it is manifest that the Legislature did not intend by the statute under consideration to vest the exclusive power in the County Attorney for enforcing its various provisions. The authority conferred upon that officer and the general power of the chief law officer of the

State may stand together without conflict; and we so hold."

The duties thus stated inhere in the office of Attorney General and are the *general* duties that rest upon that officer; but in addition to those general duties the Legislature of the State of Minnesota, by Chapter 227, Section 3, General Laws of Minnesota, 1905, which also appears as Section 58 of the Revised Laws of Minnesota, 1905, imposes special duties upon the Attorney General.

Section 3 provides that whenever any corporation shall have offended against the laws of the State, or misused, surrendered, abandoned or forfeited its corporate authority or any of its franchises or privileges, he shall cause proceedings to be instituted against it.

If the Northern Pacific Railway Company after May 1st, 1907, charged a passenger rate higher than two cents per mile between points within the State of Minnesota, it, or rather the agent who acted for it in selling the ticket, would have "offended against the laws of the State"—that is, he, the agent, would have committed a felony, and the Attorney General in such case is expressly directed by Section 3 of Chapter 227 to "cause proceedings to be instituted against it," that is against the railroad company or its agent offending against the law.

If after June 1st, 1907, the Northern Pacific Railway Company, or rather its agents, charged or exacted rates on commodity freight in excess of the

rates prescribed by the commodity act of April 18, 1907, they thereby "offended against the laws of the State," and it thereupon became the special duty of the Attorney General, under the provisions of Section 3, Chapter 227, to "cause proceedings to be instituted against it."

The duty thus specially imposed upon the Attorney General relates to but one class in the community.

It is not the special duty of the Attorney General, if indeed it can be said to be his general duty, to initiate criminal proceedings against persons, in general, offending against the criminal laws of the State.

But section 3, chapter 227, General Laws of 1905, makes it the *special* duty of the Attorney General to "cause proceedings to be instituted whenever a corporation shall have offended" against the laws of the State.

In the face of this express statutory provision, can it be said that the Attorney General is not thereby *specially* charged with the duty of enforcing the provisions, both civil and criminal, of the passenger and commodity acts?

If he is not, is it not because the provisions of section 3, chapter 227 were not inserted and repeated in the passenger and commodity acts?

Would the case be any stronger if the provisions of section 3 had been inserted and repeated in those acts?

The order of September 7th, 1906, prescribing a schedule of rates on classified freight was and is

the act of the Railroad and Warehouse Commission.

In the main cause injunctions both temporary and permanent are sought against the rates prescribed in that order.

Section 1960 Revised Laws of Minnesota 1905, reads as follows:

> "1960. Attorneys—The attorney general shall be *ex officio* attorney for the commission. He shall institute and prosecute all actions which the commission shall order brought, and shall render the commissioners all advice, counsel and assistance necessary for the proper performance of their duties. The county attorney of any county in which an action is pending, prosecuted or defended by the direction of the commission shall aid in the prosecution or defence thereof until final determination, when requested by the commission. When necessary, the commission may employ additional counsel to assist the attorney general."

It will be observed that the language of section 1960 confides nothing to the discretion of the Attorney General.

Its language is, "He shall institute and prosecute all actions which the commission shall order brought."

Section 1987 prescribes the penalties for the violation by any common carrier or warehouseman of any of the provisions of chapter 28, under which the order of September 7th, 1906, was made. It reads:

> "1987. Violations of law—Penalty—Any common carrier or warehouseman who shall do, or attempt to do, any act forbidden by this chapter, or shall fail to do anything therein re-

quired of him, or shall wilfully suffer or permit any such unlawful act or omission, when no specific penalty is imposed therefor, if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offence, and not less than five thousand dollars, nor more than ten thousand dollars for each subsequent offence; and, if such carrier or warehouseman be a corporation, it shall forfeit to the State for the first offence not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offence not less than five thousand dollars, nor more than ten thousand dollars to be recovered in a civil action. All fines and forfeitures collected under the provisions of this chapter shall be paid into the state treasury to the credit of the general revenue fund."

Under the provisions of chapter 28, Revised Laws of Minnesota, 1905, which includes the two sections above quoted, it cannot be said that the Attorney General is not specially charged with a duty in connection with the enforcement of the order of September 7th, 1906.

If the Attorney General is, because of the provisions of Chapter 28, Revised Laws of Minnesota 1905, and the provisions of Section 58, Revised Laws of Minnesota 1905, specially charged with the duty of enforcing the order of the Commission of September 7th, 1906, and by the provisions of said section 58 specially charged with the duty of enforcing the provisions of the passenger and commodity acts, does not that fact dispose of this proceeding under all the adjudicated cases?

In *Fitts v. McGhee*, 172 U. S. 516, at page 529, it was said:

> "*It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February* 9, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter v. Greenhow*, 114 U. S. 270; *Allen v. Baltimore & Ohio Railroad*, 114 U. S. 311; *Pennoyer v. McConnaughy*, 140 U. S. 1; *In re Tyler*, 149 U. S. 164; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 388; *Scott v. Donald*, 165 U. S. 58, and *Smyth v. Ames*, 169 U. S. 466.
>
> "*Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights.* There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. *In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement.* If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the stat-

> ute, by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes."

This quotation from the case of *Fitts v. McGhee* can leave no doubt whatever that that case was in the main, made to turn on the proposition that the Attorney General was not specially charged with the enforcement of the statute involved in that case, and that the Governor and the Attorney General cannot be made parties to an action, the sole purpose of which is to test the constitutionality of a statute.

It has not been suggested, nor can it be, that the case of Perkins and Shepard against the Northern Pacific Railway Co. is a case brought for the purpose of testing the constitutionality of the Statutes of Minnesota referred to in the course of this litigation as the passenger and commodity acts.

It is a suit brought on the theory that the order of September 7th, 1906, and the two acts referred to, prescribe rates so low that, in their operation, the property of the complainants, who are stockholders in the Northern Pacific Railway Co. will be taken without due process of law, and that these Statutes in their operation deny to the complainants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the

United States.

It is a suit brought against the corporation itself to enjoin the putting into effect of these rates, in which the Attorney General is made a party to prevent him from enforcing the drastic and unconstitutional provisions of the order and the acts referred to pending a final hearing of the cause.

It is not questioned that if the statutory provisions referred to, charge the relator as Attorney General with any special duty in connection with the enforcement of the order of September 7th, 1906, or the passenger and commodity acts, that a suit against him, like the main suit herein, is not a suit against the State within the meaning of the Eleventh Amendment.

If it shall be held that those provisions of the Statutes of Minnesota do not have that effect, then, putting aside for the moment our second proposition, that the State is not the real party in interest, we have this case presented. A bill filed containing all the essential and proper elements of a bill in equity, alleging that the rates herein referred to are so low that in their operation complainants will be deprived of their property without due process of law, and be denied the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Also

"That Edward T. Young, as Attorney General of the State of Minnesota, in behalf of said Commission, will, as your orators are advised and believe, institute proceedings by man-

damus or otherwise against said Railway Company, its officers, directors, agents or employes, to enforce said orders and all the provisions thereof; and threatens to and will take other proceedings against said company, its officers, directors, agents and employes, to the same end and for the same purpose."

"If said railway company, its officers, directors, agents and employes shall fail or refuse to keep in force the tariff prescribed by said act of April 4th, 1907, or fail or refuse to put in force and effect the tariffs prescribed by said act of April 18th, 1907, said defendant, Edward T. Young will, as your orators are advised and believe, institute mandamus or other proceedings for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof" (Record pp. 14, 15),

and praying that injunctions both temporary and permanent be issued, restraining said Young, as such Attorney General from carrying out his purpose so stated.

To that bill the Attorney General interposed a general demurrer, which admits all the facts well pleaded in the bill, including those above stated; and by his demurrer the Attorney General challenges the jurisdiction of the court to grant any relief whatever as against his threatened action.

His position is that immunity from suit is secured to the State, as such, absolutely by the provisions of the Eleventh Amendment, so that the State cannot be made a party defendant.

That he, as Attorney General, not being charged with any duty in connection with the enforcement of the order and acts aforesaid, cannot be made a party defendant, and that making him such is, in

effect, a suit against the State.

That the members of the Railroad and Warehouse Commission cannot be made parties defendant, because by the express terms of the commodity act, and for the very purpose of preventing their being made parties defendant, they are exempted from the performance of any duty *"to enforce any rates specifically fixed by this or any other statute of this State."*

Starting with the foregoing premises, the Attorney General maintains as a conclusion that notwithstanding the commodity act has been found by the Circuit Court to infringe the provisions of the Fourteenth Amendment, and therefore to be unconstitutional and void, and notwithstanding a temporary injunction has been issued out of the Circuit Court, enjoining the railroad company, its officers, agents, etc., from putting into effect the schedule of rates prescribed by the act, and enjoining him as Attorney General from taking any steps to compel the railroad company, its officers, agents, etc., to put into effect the schedule of rates prescribed by the commodity act, that he can deliberately violate that injunction and ignore the mandate of the Circuit Court, with impunity.

In other words, that the proceedings in the Federal Court, so far as they operate to restrain the enforcement of the unconstitutional commodity act are absolutely void as to him.

Of course, if the position so taken be sound, a weak spot, the presence of which has not heretofore been suspected, has been discovered in the Federal

Judicial System, and the Circuit Court lacks power to enforce its own decrees; because the fact that it has jurisdiction over the railroad company cannot be questioned, and that it had power to award the injunction against the railroad company, its officers and agents, as prayed for, has been affirmed so often in this Court that it cannot be considered open to doubt.

If, after that decree has been entered, so that its violation by the railroad company, its officers or agents, would subject it and them to punishment in the court below, the relator can, by proceedings in a State Court, punish the railroad company, its officers and agents, if it or they do not violate the injunction issued by the Circuit Court, then the Federal Circuit Court, when it comes to the matter of enforcing its own mandates and decrees, is indeed helpless.

Of course, it goes without saying that no such defect does exist in the Federal Judicial System, and that no such course as that followed by the Attorney General can be sustained.

The Court below, with reference to this phase of the case, said:

> "Now, with respect to whether the Attorney General should be included as a party in case the court should determine to grant an injunction. It seems to me that he must be so included, and if it should turn out that this law shall be held to be unconstitutional, it will be no protection to him. There is no other practical way to raise the question than by bringing a suit of this kind and making the Attorney General a party to it. There would be no

purpose in going on with these actions if the Attorney General is left out. He is the person who it is alleged in the bills has threatened and is threatening to enforce these alleged unconstitutional rates; and if not enjoined of course he will be entirely free to proceed to enforce them. The one statute of the State which requires him in such a case to so proceed is Section 395 of the Statutes of Minnesota (should be section 3, Chapter 227, laws of 1905, which also appears as section 58, Revised Laws of Minnesota, 1905), and by that, he is required in case he shall have evidence that a railway company has committed any offense against the laws of the State, or has failed to exercise its franchises, or misused or abandoned them, to commence a prosecution against the railroad company at once. It is not a matter that is left to his discretion as to whether he shall proceed or not; the statute requires him to do so. As far as the alleged offenses for violation of this act are concerned, it seems to me that the direction to the Attorney General is just as potent as if it were included in the act itself.

I think therefore that if the showing shall be such that it will appear to the court that an injunction should issue then the Attorney General should be included in it; and that this is not within the decisions of the Supreme Court a suit against the State, but against the Attorney General as an officer charged with the enforcement of these acts which are claimed to be unconstitutional.

This is as far, perhaps, as I need go at the present time." (Record, pages 60 and 61).

In *Starr v. Chicago etc. Railway Co.*, 110 Fed. 3, 8, it was said:

"This suit then, was commenced in 1893. This court at that time obtained jurisdiction of the subject-matter of this litigation, of the issue whether or not this law of Nebraska was consti-

tutional and enforceable, and of the parties to this suit,—the railway company and those who were then acting as officers of the State. It rightfully enjoined the company from reducing its rates to those prescribed by law, and it lawfully prohibited the Attorney General of the State and its other officers from enforcing its provisions. That injunction has never been vacated or modified, and it still remains in force. *Vulcanite Co. v. Folsom* (C. C.), 3 Fed. 509. The defendant Frank N. Prout is prosecuting actions commenced in 1900, six years after this suit was begun, to recover of the defendant railway company penalties to the amount of $450,000, because it obeyed the injunction of this court, and failed to reduce its charges to those specified by the unconstitutional law. In other words, the effect of these later actions is to toll off to another court the question which has long been and still is properly in litigation here, to severely punish one of the parties to this suit for its obedience to an injunction lawfully issued upon a prayer of the complainants in this court, and to forestall and nullify any decision and decree of this court regarding issues of which it first lawfully took jurisdiction. The impropriety, the inadmissibility, of such a proceeding, in the light of the fundamental rules of our judicial systems, to which we have now adverted, is so manifest that we have no doubt that the learned Attorney General, when his attention is once directed to them, will at once perceive the propriety and necessity of suspending all action in other courts involving the unconstitutionality of this law, and the right and duty of this railway company to reduce its charges to those there prescribed, until this court, which first acquired jurisdiction of the issues and the parties, has finally determined the questions presented. * * * If the state courts had first taken jurisdiction of the issues involved in this suit, we should have gladly followed the fore-

> going decision, but the rule applies where the federal court first takes jurisdiction as well as where jurisdiction is first acquired by the state court. The enforcement of this rule, that the court which first takes jurisdiction must retain and exercise it to the exclusion of all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree, and by its effective execution, is indispensable to prevent unseemly conflicts between courts and their officers, and 'confusion worse confounded.'"

The case last cited was affirmed in this Court under the title of *Prout v. Starr*, 188 U. S. 537, in an opinion that ought to put the question under discussion at rest, in which this Court for the first time considered the Eleventh Amendment in connection with the Fourteenth Amendment, and, we think, left no room for doubt, that where State legislation transcends the prohibitions of the Fourteenth Amendment, that the Eleventh Amendment cannot be "successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments."

If we have properly construed the provisions of Section 3, Chapter 227, Laws of Minnesota 1905, the Attorney General is specially charged with the duty of enforcing the provisions of the commodity act, as well as the passenger act, and this fact distinguishes the main case from *Fitts v. McGhee*, and compels the conclusion that it is not a suit against the State, within the inhibition of the Eleventh Amendment.

ADEQUATE REMEDY AT LAW.

One of the grounds on which this Court in *Fitts v. McGhee,* (1899) 172 U. S. 516, rested its opinion was, that the bridge keeper had an adequate remedy at law in that he could, when indicted, interpose the defense that the statute prescribing rates of toll for the use of the bridge was unconstitutional and void in this, that the rates therein prescribed were so low as to be non-compensatory and confiscatory.

Mr. Justice Harlan wrote the opinion, from which there was no dissent.

That case on its face is said to be in conflict with *Smyth v. Ames,* (1898) 169 U. S. 466, decided less than ten months before, and with the subsequent cases of *Cotting v. Kansas City Stockyards Co.* (1901) 183 U. S. 79; *Prout v. Starr* (1902) 188 U. S. 207; *Gunther v. Atlantic Coast Line* (1905) 200 U. S. 291; *McNeill v. Southern Ry. Co.* (1905) 202 U. S. 559; *Mississippi Railroad Commission v. Illinois Cent. Ry. Co.* (1906) 203 U. S. 335, decided since—cases in which the members of this Court who participated in the decision of *Fitts v. McGhee,* concurred; a circumstance that at once suggests that however general the language of the opinion may be, the decision itself was not intended in fact to disturb the doctrine of the *Reagan* and *Smyth* cases that preceded it, nor of those that followed it.

This is apparent from the fact that in the opinion in *Fitts v. McGhee,* both the *Reagan* and *Smyth* cases are cited without disapproval and in the sub-

sequent cases of *Prout v. Starr, Gunther v. Atlantic Coast Line* and *McNeill v. The Southern Railway Co., Fitts v. McGhee* was cited in like manner.

The opinion rests upon the facts in that case and it becomes important to know what those facts were.

The law operated only upon toll bridges.

Undoubtedly at that time (1895) they were but few in number, and simple and comparatively inexpensive in construction.

In any single case the question of what is a reasonable rate would have reference to a single structure.

What the cost of construction was, and what the present cost of reproduction would be, were matters that a bridge engineer could determine in a few minutes.

What the salaries of the bridge keepers were, and what the cost of maintenance was, were also matters the expense account would show, and on a trial of the bridge keepers on an indictment for violating the statute an hour would probably suffice to put in the evidence covering this matter, and it must be with reference to such a situation that the statement in the opinion was made that when put on trial for violating the law the bridge keepers could interpose the defense that the statute was unconstitutional and, therefore, they had an adequate remedy at law.

In *Cohen v. Virginia*, 6 Wheaton 399, Chief Jus- Marshall said:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used."

In *People v. Winkler*, 9 Cal. 236, the Court said:

> "It is true that the language of that opinion taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled that the language of an opinion, in general must be held as referring to the particular case decided."

In *Wells on Stare Decisis*, Section 584, it is said:

> "A second fundamental law is, that language used in an opinion whether in the reasoning or the conclusion established thereby, is always to be explained and restricted by the case under consideration and to that extent only is a decision fitted to serve as a precedent."

Even in the comparatively simple case stated, if the bridge keepers were tried on two of the one hundred indictments returned against them, and the first jury found on the evidence that the rates prescribed were reasonable the statute would be constitutional and might remain so until noon the next day, when the jury in the second case on the same or different evidence might return a verdict finding the rates unreasonable and confiscatory, whereupon the statute would become unconstitutional for a day or two.

And so the performance would continue until the one hundred indictments were disposed of.

And in the meanwhile the defendants, and probably other good citizens would be thinking and saying things about the uncertainties of the law that

would hardly bear repetition in polite society, and respect for the law generally would not increase in that locality.

The defendants relegated to the criminal court with no resources but their scant salaries, with one hundred indictments staring them in the face, and with lawyers' bills and other expenses of litigation to defray, could not well be criticised if they cast wistful glances towards the doors leading to a court of equity, in which one trial and one decree would settle the vexed question for all time.

Nor ought their intelligence to be too severely questioned if they showed an inability to comprehend what courts and lawyers mean by the expression "an adequate remedy at law."

But has any Court ever suggested, or would relator or any of his counsel think of intimating, that the unconstitutionality, for instance, of the commodity act in question in this litigation could be interposed as a defense by a freight agent indicted for violating the act?

Is the subject one that can be submitted to a jury?

What is a reasonable rate?

Is there unanimity of judicial opinion on that question?

What elements and facts must be taken into consideration in determining, for instance, whether an intrastate freight rate is reasonable?

What percentage of operating expenses should be charged against passenger earnings?

And what percentage against freight earnings?

What percentage of the operating expenses of the system should be charged against intrastate traffic, and what against interstate traffic?

Who can answer these questions?

What an issue with its tables of percentages, masses of statistical matter, and vocabulary of technical terms to submit to a jury made up of twelve simple, upright and honest tillers of the soil.

Some juries would find that a given rate was a reasonable one.

Some juries would disagree.

Some juries would find that the rate was an unreasonable one.

So that part of the time the law would be constitutional.

Part of the time its constitutionality would be in doubt.

And part of the time it would be unconstitutional.

It never occurred to any member of this Court, nor so far as the reported cases show, to any attorney to suggest in any suit involving the reasonableness of schedules of railroad rates that that question could or ought to be tried to a jury.

There were the *Reagan*, *Smyth*, *Cotting*, *Prout*, *Gunther* and *McNeill* cases in which the suggestion might have been made.

The record in this proceeding shows that there are nine cases pending involving as many different railroad systems—all interstate, with a mileage of

over 41,000 miles; a mileage in the aggregate twice that of Great Britain, serving a territory exceeding in extent one-fourth of the area of Europe, including Great Britain; and as alleged in the Bill and admitted by the demurrer thereto, of an actual value of more than fifteen hundred million dollars.

Does not this brief statement explain why it has never occurred to any court or lawyer to suggest that the rule laid down in *Fitts v. McGhee*—that the unconstitutionality of a rate statute can be interposed by the railroad official or employee as a defense to an indictment for violating the Act?

In such a case the defendant would be met at the outset of the trial with the presumption that the rates were reasonable and that the statute was constitutional, and with the burden resting upon him in order to escape penal servitude of overcoming those presumptions, the expense of which proceeding no ordinary fortune could stand.

In *Chicago, Etc. Railway Co. v. Minnesota*, 134 U. S. 418, 459, Mr. Justice Miller said:

> "Neither the Legislature nor such Commission acting under the authority of the Legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.
>
> "In either of these classes of cases there is

an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the Commission is such as to deprive a party of his property without due process of law.

"But until the judiciary has been appealed to, to declare the regulations made, whether by the Legislature or by the Commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character, and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

Can anyone doubt the absolute correctness of the law as just stated?

We submit that we have shown that the facts in the pending case take it entirely out of the rule laid down in *In re Ayers* and in *Fitts v. McGhee*.

With reference to *Fitts v. McGhee*, we have shown that under the laws of Minnesota the relator,

as Attorney General, is specially charged with a duty in connection with the enforcement of both the order of the Commission of September 7, 1906, prescribing a schedule of merchandise rates, the passenger act of April 4, 1907, and the commodity act of April 18, 1907.

And second, that under the facts in the main case no adequate remedy at law exists.

We think, however, that *Fitts v. McGhee* is unsound, and should be overruled on both points—that is, that a rule which makes the constitutionality of a statute prescribing schedules of rates depend upon the varying verdicts of juries cannot be sound, and that making the right to enjoin the law officers of the State from enforcing legislation, violative of the Constitution of the United States depend upon whether a special duty connected with the enforcement of statutes is imposed upon such officer, places the right on a foundation too easily undermined as the provisions of the commodity act herein demonstrate.

SECOND: We contend that the suit of Perkins and Shepard against the relator and the Northern Pacific Railway Co. is not a suit against the State, because it is a suit in which the State is not the real party in interest, and is not the party upon whom a judgment against the defendants or any of them would operate.

We think that this point is completely covered and disposed of by what is said by this court in

Reagan v. Farmers' Loan and Trust Company, 154 U. S. (1893) 362, 390.

In that case it is said:

"Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest, which the State can have arises when it abandons it governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and fed-

eral, is in restraining the collection of taxes, illegal in whole or in part."

In *Missouri etc. Railway Co. v. Missouri Railroad and Warehouse Commissioners* (1901), 183 U. S. 53, 59-61, this court re-affirmed what was said on this point in the *Reagan case* and added:

"But this case is not like *Ferguson v. Ross*, and does not come within the rule above stated. It is not an action to recover any money for the State. Its results will not enure to the benefit of the State as a State in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate.

"It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State *as an artificial person. Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-390.

"While not controverting these general propositions, the Supreme Court of the State was of the opinion that the State had a direct, pe-

cuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because were the litigation pushed to the extreme there might be penalties imposed which would when collected pass into the school fund of the State. * * *

We are unable to concur in these views. Whatever may be the result of any subsequent or ancillary proceeding the direct object of this suit is to obtain a decree of the court commanding the railway company to comply with the order of the commissioners. Such a decree is similar to the ordinary decrees of a court of equity, and it is familiar that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquents. So that if this possible pecuniary result is sufficient to make the State the real party plaintiff it would follow that in Missouri the State is the real party plaintiff in every equity suit, because in every equity suit such penalties may be imposed."

The case of Perkins and Shepard against the Northern Pacific Railway Company, is not a suit against the State, *eo nomine*, and it is submitted that if the rule laid down in the *Reagan case* in 1893, and re-affirmed by this court in 1901, in the case last quoted from, is to be followed, the State is not the real party. And this ought to effectually dispose of the pending proceeding adversely to the relator.

THIRD: The Fourteenth Amendment, so far as here applicable, provides, that

"No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor

shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The counsel for the relator construes the Fourteenth Amendment as though it read:

"Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws *unless it sees fit to do so, in which case the prohibitions of this amendment shall not prohibit.*"

As is said in the leading case of *Taylor v. Porter,* 4 Hill. 140:

"That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense.

The people would be made to say to the two houses, 'You shall be vested with the legislative power of the State; but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose.

In other words, you shall not do the wrong unless you choose to do it."

In *Dorman v. State,* 34 Ala. 216, it was said:

"If life, liberty and property could be taken away by direct operation of a statute, the enjoyment of those rights would depend upon the will and caprice of the Legislature, and the provision would be a nullity. Thus construed the constitution would read: 'No person shall be deprived of life, liberty or property, unless the Legislature pass a law to do so. * * *

The clause is to be largely and liberally construed in favor of the citizen."

In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice Miller, after conceding that the phrase "due process of law" remains today without that satisfactory precision of definition which judicial decisions have given to nearly all other guarantees of personal rights found in the constitutions of the several states and of the United States, and also that Magna Charta was only designed to operate upon kingly prerogative and not as a restraint upon Parliament whose members were the nobles who extorted the Charter from John at Runnymede, continues:

> "But when in the year of Grace 1866 there is placed in the Constitution of the United States a declaration that 'No State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process which, by its own legislation, it chooses to declare such?
>
> To affirm this is to hold that the prohibition to the States is of no avail, or, has no application when the invasion of private rights is affected under the forms of state legislation."

Of course such a construction is not only inadmissible but absurd.

In this proceeding it is not so important to know what the Constitution of the United States meant the moment the Eleventh Amendment became a part of it as it is to know what that instrument has meant since the Fourteenth Amendment became effective.

This much is clear, that the adoption of the Fourteenth Amendment operated to change the Constitution from what it had been theretofore, and it is

equally clear that the changes made were in the nature of prohibitions to the States, cutting down theretofore existing power in the States; and the question is whether, if a State Legislature passes an act that contravenes the provisions of the Fourteenth Amendment, prohibiting legislation which operates to deprive a person of his property without due process of law, or denies to any person the equal protection of the laws, courts of equity have jurisdiction to restrain State officers from enforcing such legislation—whether such a suit is a suit against the State.

The contention of the relator and his counsel is that when a State enacts a statute in violation of the prohibitions of the Fourteenth Amendment in the respects above stated, and inserts in the confiscatory and unconstitutional enactment a provision that no state officer shall be charged with the duty of enforcing the act, a suit against a state officer, whose general duty it is to enforce the law, to restrain the enforcement of the act is *necessarily* a suit against the State, and, that being so, under the provisions of the Eleventh Amendment no court can take jurisdiction.

Of course, if this contention be sound, a device has been discovered, by means of which the prohibitions of the Fourteenth Amendment can be successfully evaded.

As construed by this Court in *Osborn v. Bank,* 9 Wheat. 738, the Eleventh Amendment only applied when the State *eo nomine,* was a party on the record.

Later on, the rule announced in the *Osborn case* on this point was modified, and the Eleventh Amendment was construed to apply to cases in which, though not nominally a party, the record showed that the State was the real party upon which the decree would operate. *In re Ayers,* 123 U. S. 443-489.

We maintain that if, by any sort of political or legislative device, cunning or legerdemain, a situation is presented in which no officer of the State is specially charged with or has any special duty to perform in the enforcement of the laws of the State —the situation sought to be produced in the case at bar by the provisions of section 5 of the commodity act, herein quoted, and by the device of making the legislation automatic and self-executing in its operation, and prescribing drastic penalties for a failure to comply with the law—that if the statute is violative of any of the provisions of the Fourteenth Amendment, a suit in equity may be maintained against the State, *eo nomine,* or against the officers in the executive department of the State, whose *general* duty it is to enforce the laws of the State.

It must be that one or the other alternative stated is open to a person whose property rights are invaded by such legislation, or it must be held that he has no remedy, and that the prohibitions of the Fourteenth Amendment were not intended to prohibit.

We think beyond question, the second alternative points out the course open to a person whose rights

are infringed by legislation of the type mentioned and that the case of *Prout v. Starr*, 188 U. S. 537 is decisive on this point.

We here, with becoming diffidence, suggest that the opinion of Chief Justice Marshall in *Osborn v. Bank* was planted on a foundation of judicial adamant, and never ought to have been disturbed; and that its modification gave rise to all of the doubts, confusion and difficulties that exist in this branch of the law.

In that case the Eleventh Amendment was construed to apply only when the State was a party on the record.

And, as was said in that opinion:

> "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the Constitution given, by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction? * * * But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases, where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The Amend-

ment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

"The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

This view has been repeatedly maintained by Mr. Justice Harlan in his dissenting opinions in numerous cases, including *In re Ayers*, 123 U. S. 443-516, and we think that the concluding paragraph of that dissenting opinion is unanswerable, viz.:

"A contrary view enables the State to use her immunity from suit to effect what the Constitution of the United States forbids her from doing, namely, to enact statutes impairing the obligation of her contract. If an officer of the State can take shelter behind such immunity while he proceeds with the execution of a void enactment to the injury of the citizen's rights of contract, it would look as if that provision which declares that the Constitution of the United States shall be the supreme law of the land, anything in the Constitution or laws of a State to the contrary notwithstanding, had lost most, if not all, of its value in respect to contracts which a State makes with individuals.

"I repeat that the difference between a suit against officers of the State, enjoining them from seizing the property of the citizen, in obedience to a void statute of the State, and a suit enjoining such officers from bringing under the order of the State, and in her name, an ac-

tion which, it is alleged, will result in injury to the rights of the complainant, is not a difference that affects the jurisdiction of the Court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class."

Again in *In re Sawyer*, 124 U. S. 200, 224, in his dissenting opinion, Mr. Justice Harlan says:

"Parsons' suit is, confessedly, of a civil nature; and it proceeds upon the ground that what the defendants propose to do will violate rights secured to him by the Constitution of the United States. It is, therefore, a suit arising under the Constitution of the United States. Whether the Circuit Court, sitting *in equity*, could properly grant to the plaintiff the relief asked is not a question of jurisdiction within the rule that orders, judgments, or decrees are void, where the Court which passed them was without jurisdiction. It is rather a question as to the exercise of jurisdiction. As this suit is one arising under the Constitution of the United States, and is of a civil nature, the inquiry in the mind of the Circuit Judge, when he read the bill was whether, according to the principles of equity, a decree could be properly rendered against the defendants? *Osborn v. U. S. Bank*, 9 Wheat. 738, 858.

"The statute provides that 'suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' But if one of those Courts should render a final decree in behalf of the plaintiff, notwithstanding he had a plain, adequate and complete remedy at law, would the decree be a nullity? Could it be assailed, collaterally, as void, upon the ground that no case was made justifying relief in equity? When a party has disregarded a preliminary injunction issued by a Circuit Court of the United States, has been

fined for contempt, and is in custody for failing to pay the fine, must he be discharged upon *habeas corpus* in every case where it appears upon the face of the bill, that the plaintiff has a plain, adequate and complete remedy at law? Those questions, it seems to me, should receive a negative answer. I do not understand the Court to decide that the Circuit Court could not, under any circumstances, or by any mode of proceeding, enforce the rights which the plaintiffs contend are about to be violated by the defendants; but only, that the Court below, sitting in equity, had no authority to interfere with the proposed action of the defendants. *It seems to me that this question would properly arise upon appeal from any final decree rendered in the cause and is not determinable upon writ of habeas corpus.*"

The rule laid down in the *Osborn* case has the merit of simplicity and certainty.

Where jurisdiction depends upon the party, an inspection of the record will at once determine whether jurisdiction does or does not exist.

If a suit, on the record, is against the officers or agents of the State, then, to quote from the opinion in the *Osborn* case, "the true question is not one of jurisdiction, but whether in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

Where, on the record, the suit is not against a State as such, but against persons who sustain to the State the relation of officers or agents, the Court, under the rule laid down in the *Osborn* case, would have jurisdiction over the defendants

on the record; but would not make a decree affecting the substantial rights of the State, for the same reason that is presented constantly in equity courts—that is—because the State is not and, it might be added, cannot be made a party to the action.

If there is a want of jurisdiction, that question is ordinarily presented by a plea and determined at the outset.

If the defendants, claiming to be the State, are in Court standing upon a statute, the question may be simple enough for ready disposition at the outset, if the statute is unconstitutional on its face; but many statutes are not unconstitutional on their face, as was the case in *Smyth v. Ames*, requiring the production of evidence to demonstrate their unconstitutionality.

It is difficult in the type of cases last mentioned, to understand how the Court ever could progress far enough to determine whether the statute was unconstitutional or not, if that question depended upon the evidence.

It certainly would, as was said by Mr. Justice Harlan, be the exercise of jurisdiction by the Court, if it proceeded to determine from the evidence whether a statute, not unconstitutional upon its face, was unconstitutional in fact.

This rule can be applied, we think, to most of the cases in this Court in which a plea to the jurisdiction of the Court was sustained, on the ground that the defendants were officers or agents of the State, and that the suit against them was, in fact

one against the State.

And we think that rule, if re-adopted, would work out very satisfactory results.

In all the cases in this Court brought against officers or agents of the State as parties, the purpose of which was, in effect, to compel the specific performance of contracts to which the State was a party, or to compel *affirmative* action of any kind on the part of the State, the rule of the *Osborn* case, if applied, would have resulted in entertaining jurisdiction, hearing the cases, and then, when it became apparent that relief was sought that was not of a character that could be granted in the absence of the State as a party, refusing to make a decree granting that relief, on the ground that the party upon whom the decree would operate was not before the Court, and because of the provisions of the Eleventh Amendment, could not be brought before it.

We submit, particularly in view of the prohibitions of the Fourteenth Amendment, that the rule laid down by Chief Justice Marshall in *Osborn v. Bank,* ought to be adhered to.

It ought not to be possible for a person claiming to be an officer of the State to shield himself behind the provisions of the Eleventh Amendment, while executing State legislation violative of the prohibitions of the Fourteenth Amendment.

A construction which leads to the conclusion that the Fourteenth Amendment may be violated by the States with impunity is to be put aside for a construction that gives effect to that Amendment

at the expense (if that be necessary), of a modification of the Eleventh Amendment.

It is a singular fact that while the construction of the Eleventh Amendment is very elaborately considered in the opinions in *In re Ayers*, and *Fitts v. McGhee*, the cases mainly relied upon by the relator to sustain the position taken by him, no reference whatever is made in either opinion to the Fourteenth Amendment; and the question of the proper construction of the Eleventh Amendment is also discussed at length in *Smyth v. Ames* without the slightest reference to the Fourteenth Amendment or its effect upon the Eleventh Amendment. But when the second edition of *Smyth v. Ames* appeared in this Court in 1902 under the title of *Prout v. Starr*, 188 U. S. 537, 542-544 for the first time, so far as we are advised, the question of the construction of the Eleventh Amendment was considered in connection with other provisions of the Constitution existing before the adoption of the Eleventh Amendment, and also the provisions of the Fourteenth Amendment, and the conclusion reached and clearly expressed that the Eleventh Amendment cannot "be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments."

The Court said:

> "But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the State of Nebraska, and is in contravention of the

Eleventh Amendment of the Constitution of the United States.

"It is a sufficient answer to this contention that it was made, considered and determined in *Smyth v. Ames.* In the opinion in that case it was said:

" 'Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment. *Pennoyer v. McConnaughy,* 140 U. S., 1, 10; *In re Tyler,* 149 U. S. 164, 190; *Scott v. Donald,* 165 U. S. 58, 68; *Tindal v. Wesley,* 167 U. S. 204, 220.'

"The Constitution of the United States, with the several Amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which

still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment. *Hans v. Louisiana,* 134 U S. 1, 10; *North Carolina v. Semple,* 134 U. S. 22; *Harkrader v. Wadley,* 172 U. S. 148; *Fitts v. McGhee,* 172 U. S. 516.

"It is one of the important functions of this Court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

That under the facts in the main case the relator was properly made a party defendant and that the suit as against him was not and is not a suit against the State, we submit does not admit of doubt.

See

Osborn v. Bank, (1824) 9 Wheat. 251.

Davis v. Gray, (1872) 16 Wall. 203.

Board v. McComb, (1875) 92 U. S. 531, 541.

Poindexter v. Greenhow, (1884) 114 U. S. 270.

Allen v. B. & O. R. R. Co., (1884) 114 U. S. 311.

In re Sawyer, (1887) 124 U. S. 200.

Pennoyer v. McConnaughy, (1890) 140 U. S. 10.

In re Tyler, (1893) 149 U. S. 164.

Reagan v. Farmers Loan & Trust Co., (1893) 154 U. S. 362.

Belknap v. Schild, (1895) 161 U. S. 10.

Scott v. Donald, (1896) 165 U. S. 112.

Tindal v. Wesley, (1896) 167 U. S. 205.

Smyth v. Ames, (1897) 169 U. S. 466.

Smith v. Reeves, (1899) 178 U. S. 436.

Cotting v. Kansas City Stock Yards Co., (1901) 183 U. S. 79.

Pacific Whaling Co. v. United States, (1902) 187 U. S. 447.

Prout v. Starr, (1902) 188 U. S. 537.

Davis v. Los Angeles, (1902) 189 U. S. 207.

Gunther v. Atlantic Coast Line, (1905) 200 U. S. 291.

McNeill v. Southern Ry. Co., (1905) 202 U. S. 559.

Miss. R. R. Commission v. Ills. Centr. R. R. Co., (1906) 203 U. S. 335.

WM. A. LANCASTER,
J. F. MCGEE,
on behalf of Wm. H. Grimshaw,
U. S. Marshal.

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Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 10.

(ORIGINAL.)

Ex parte:

IN THE MATTER

OF

EDWARD T. YOUNG, *Petitioner.*

Brief in Opposition to Motion for Leave to file petition for writs of habeas corpus and certiorari.

WALKER D. HINES,
Of Counsel for Southern Railway Company, a party to other pending cases involving similar questions.

WASHINGTON, D. C.,
Dec. 2, 1907.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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Supreme Court of the United States.

IN THE MATTER OF EDWARD T. YOUNG, Petitioner.	No. 10, Original.

BRIEF ON BEHALF OF SOUTHERN RAILWAY COMPANY, PARTY TO OTHER PENDING CASES INVOLVING SIMILAR QUESTIONS.

Statement of Facts.

The petitioner herein claims to be unlawfully in custody by virtue of a commitment by the Circuit Court of the United States for the District of Minnesota, Third Division, for contempt of an order of that Court in the suit of *Charles E. Perkins et al. vs. Northern Pacific Railway Company et al.*, in which suit the petitioner was a defendant. The petitioner claims that his commitment was unlawful because the suit in which the order was rendered is as to petitioner a suit against the State of Minnesota, and, therefore, is in violation of the Eleventh Amendment to the Constitution of the United States, and beyond the jurisdiction of the Circuit Court, and that, therefore, all proceedings therein as to petitioner are void.

The suit was brought by stockholders of the Northern Pacific Railway Company against the Northern Pacific Railway Company, the petitioner, who is the Attorney General of Minnesota, the members of the Railroad and Warehouse Commission of Minne-

sota, and several individual shippers, for the purpose of preventing the Railway Company from complying with, and the other defendants from enforcing, certain statutes of Minnesota and orders of the Minnesota Railroad and Warehouse Commission reducing railroad rates.

The Circuit Court made an order whereby, pending the final hearing of the cause and until the further order of the court, the Northern Pacific Railway Company was enjoined from putting into effect the rates prescribed by the Minnesota act of April 18, 1907, and the defendant Edward T. Young, as Attorney General, was enjoined from instituting any proceeding to enforce the penalties and remedies specified in the act, or to compel obedience to the act, and the defendant shippers and all other persons from the time that they should have notice of the order, were enjoined from instituting any proceedings for the violation of the act, or from demanding that the rates contained therein be given to them.

The order was entered September 23, 1907, and a writ of injunction in accordance therewith was served upon the petitioner on September 24, 1907. After such service and in violation of the injunction, the petitioner instituted a proceeding in the District Court of the State of Minnesota for the County of Ramsey to procure a writ of mandamus commanding the Northern Pacific Railway Company to obey said act.

For this contempt the Circuit Court ordered that he be fined the sum of one hundred dollars and stand committed in the custody of the Marshal of the court until the sum be paid and until he purge himself of his contempt by dismissing or causing to be dismissed the mandamus proceeding.

Argument.

The proceeding of the Circuit Court committing the petitioner for contempt was valid,

First, because the suit was not as to the petitioner a suit against the State; and

Second, because the order was valid as to all the other defendants enjoined and as to the subject matter of the controversy, and the action of the petitioner in instituting the mandamus proceeding had, and was intended to have, the effect of preventing the observance of the order.

I.

The Suit in Respect to the Attorney-General Was Not a Suit Against the State.

Consideration of this proposition will be aided by reference to the origin of the Eleventh Amendment and to the cases arising thereunder.

Origin of Eleventh Amendment.

In Chisholm vs. Georgia, 2 Dallas, 419, it was held that the judicial power of the United States extended to an action by a citizen of one State against another State, and that an action could be maintained against the State of Georgia to enforce a contract of the State.

"The decision created general alarm among the States, and an amendment was proposed and ratified by the States by which the power was entirely taken away so far as it regards suits brought *against* a State" (2 Story on the Constitution, Section 1683).

The amendment referred to is the Eleventh Amendment, which reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

To facilitate a discussion of the cases arising under this Amendment the cases which may be conveniently called the "rate cases" will be treated separately, and we will discuss (1) the cases which have been held to be suits against the State, (2) the cases which have been held not to be suits against the State, and (3) the rate cases.

Cases Which Have Been Held to be Suits Against the State.

The decisions in which it has been held that cases were suits against a State in violation of the Eleventh Amendment are as follows:

Suits to recover money in the general funds of a State, or property in the possession of a State government.

Sundry African Slaves vs. Madrazo, 1 Peters, 110.
Ex parte Madrazo, 7 Peters, 627.
Smith vs. Reeves, 178 U. S., 436.

Suits to affect with a lien property belonging to a State.

Cunningham vs. Macon, etc., Co., 109 U. S., 446.
Christian vs. Atlantic, etc., R. R. Co., 133 U. S., 233.

Suit to set aside a sale of property to the State.

Chandler vs. Dix, 194 U. S., 590.

Suit for a recovery upon a contract of a State.

Hans vs. Louisiana, 134 U. S., 1.

Suits to enforce directly or indirectly the performance of a contract of a State.

Louisiana vs. Jumel, 107 U. S., 711.
New Hampshire vs. Louisiana, 108 U. S., 76.
Hagood vs. Southern, 117 U. S., 52.
In re Ayers, 123 U. S., 443.
North Carolina vs. Temple, 134 U. S., 22.
Louisiana vs. Steele, 134 U. S., 230.

CASES WHICH ARE NOT SUITS AGAINST THE STATE.

These cases may be divided into three classes :

FIRST. Where there is a suit against a corporation wherein the State is a stockholder. Such cases are :

Bank vs. Bank, 9 Wheat., 904.
Bank vs. Wister, 2 Pet., 318.
Louisville, &c., R. Co. vs. Letson, 2 How., 497.

SECOND. Where there is a suit against a State officer to compel him to comply with a State statute.

In this class of cases the suit is not a suit against the State, but merely a suit to compel an officer to do that which the State has declared it to be his duty to do. An illustration of this class is

Rolston vs. Missouri Fund Commissioners, 120 U. S., 390.

In such a case the duty which it is sought to enforce must be a plain ministerial duty, because if the officer is entrusted with a

discretion the court can not regulate the manner in which he shall exercise that discretion without interfering with the exercise of the will of the State and usurping the governmental functions of the State, and a suit for the purpose of such interference would, therefore, necessarily be a suit against the State.

THIRD. The most numerous and important class of cases is the class where a suit is brought against an officer of the State either to restrain action threatened or to obtain redress for action taken by the officer in execution of some invalid statute. In such cases it is held that the invalid statute affords no protection to the officer, and he is personally subject to appropriate proceedings at law or in equity for the redress or the protection of the person complaining. Cases of this sort are the following :

Suits against officers of a State to restrain, or obtain redress for, seizures of property under invalid tax statutes.

Osborn vs. U. S. Bank, 9 Wheaton, 738.
Cummings vs. Bank, 101 U. S., 153.
Poindexter vs. Greenhow, 114 U. S., 270.
White vs. Greenhut, 114 U. S., 307.
Chaffin vs. Taylor, 114 U. S., 309.
Allen vs. B. & O. R. R. Co., 114 U. S., 311.
In re Tyler, 149 U. S., 164.

Action for redress for seizure by State officers of liquor under invalid dispensary statute.

Scott vs. Donald, 165 U. S., 58.

Action of ejectment to recover land illegally held by an officer for the State in violation of plaintiff's contract right.

Tindal vs. Wesley, 167 U. S., 204.

Suits to restrain administrative action, under void statutes, which tends to destroy or impair contract rights.

Davis vs. Gray, 16 Wallace, 203.
Board of Liquidation vs. McComb, 92 U. S., 531.
Pennoyer vs. McConnaughy, 140 U. S., 1.

IN RE AYERS AND PENNOYER VS. MCCONNAUGHY.

These recent and leading cases are strikingly illustrative of the application of the Eleventh Amendment, and repay more detailed consideration.

In re Ayers, 123 U. S., 443:

This was an original proceeding in this Court by the Attorney General of Virginia for a writ of *habeas corpus* to procure his discharge from custody under commitment of a Circuit Court of the United States for contempt of a decree rendered in the suit of *Cooper et al. vs. Marye et al.* In this suit complainants, as owners of certain Virginia bond coupons, sought to restrain the Attorney General and the Commonwealth attorneys from instituting suits in accordance with a statute of Virginia, which directed such attorneys to institute suits against all taxpayers tendering such coupons in payment of their taxes. The question for decision was whether the suit was a suit against the Attorney General and the Commonwealth attorneys personally, or, in substance, a suit against the State of Virginia.

The court pointed out (pp. 493–497) that the statute which the Attorney General and the Commonwealth attorneys were seeking to enforce was not unconstitutional, and for that reason the court held (pp. 496–497) that the bill "does not allege any ground of equitable relief against the individual defendants for any personal wrong committed or threatened by them." The court held that the relief was against the defendants in their representative capacity, and (p. 502) that the object of the bill was "by injunction indirectly to compel the specific performance of the contract" (of the State of Virginia) "by forbidding all those acts and doings which constitute breaches of the contract" (p. 502).

Thus the court decided two propositions: *First*, the bill was not a bill to prevent personal acts of officers in the execution of an invalid statute because the statute was not invalid; and, *Second*, the object of the bill was to compel indirectly the specific performance of the State's contract, and was, therefore, in substance, a suit against the State. In the light of these two propositions all the observations of the court in that case should be read.

Pennoyer vs. McConnaughy, 140 U. S., 1:

In this case certain officers of the State were proceeding in their official capacity by virtue of a statute of the State to sell certain lands which plaintiff claimed he had acquired from the State. Plaintiff claimed that the statute under which the officers were acting was unconstitutional and sought to prevent its execution by these officers to his injury. The Court, referring to *Osborn vs. Bank of the United States*, 9 Wheat., 738, said:

> "The case may then be said to have fully established the doctrine that an officer of a State may be enjoined from executing a statute of the State which is in conflict with the Constitution of the United States, when such execution would violate and destroy the rights and privileges of the complainant" (p. 11).

After further discussion the Court said :

> "But the general doctrine of *Osborn vs. Bank of the United States* that the Circuit Courts of the United States will restrain a State officer from executing an unconstitutional statute of the State when to execute it would violate the rights and privileges of the complainant which had been guaranteed by the Constitution and would work irreparable damage and injury to him, has never been departed from" (p. 12).

These two leading cases, therefore, recognize and reiterate the established proposition that

> "An officer of the State may be enjoined from executing a State statute which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant."

To make out such a case against the particular State officer, it is, of course, necessary to show that that particular officer has some substantial connection with the enforcement of the statute for, otherwise, there could be no excuse for bringing him into court at all.

The Rate Cases.

Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362

The State of Texas had passed an act creating a Railroad Commission, and authorizing it to fix rates. The act provided that if any company, or its agent or officer, should charge a greater rate than that fixed by the Commission, the company and its agent or officer should be guilty of extortion and forfeit to the State of Texas not less than $100, nor more than $5,000. The act further provided that any company violating the act should be liable to persons injured for the damages sustained, and if guilty of extortion, to pay

to the person injured a penalty of not less than $125, nor more than $500.

The act charged the Railroad Commission with the duty of enforcing the act, and also charged the Attorney General with the duty of instituting suits in the name of the State for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals.

The Commission organized under this act and fixed rates which were complained of by the railroad companies as unjust and unreasonable. Trustees of mortgages made by various railroad companies brought suits against the railroad companies, the members of the Commission and the Attorney General, and in accordance with the prayer of the bills the railroad companies were enjoined from observing the rates fixed by the Commission, and the members of the Commission and the Attorney General were enjoined from instituting suits against the railroad companies for the recovery of penalties, and all other persons were enjoined from instituting any suits against the railroad companies for damages, overcharges or penalties.

Upon appeal to this Court the decree of the Circuit Court granting the injunction against the enforcement of the rates fixed by the Commission was affirmed.

In response to the contention that the suit was a suit against the State, the Court referred to *In re Ayers*, 123 U. S., 443, and *Pennoyer vs. McConnaughy*, 140 U., S., 1, and showed in effect that it was the settled doctrine that the Eleventh Amendment covered not only suits brought against a State by name, but those also against its representatives, where the State was the only real party against which in fact relief was asked. On the other hand, it was shown that there was another class of cases where persons claiming to act as officers of a State and under the color of an unconstitutional statute commit acts of wrong and injury to the rights and property of the plaintiff, and where the remedy at law is inadequate, and that in such cases a suit for an injunction to prevent such wrong and injury is not a suit against the State and it was held that the case before the court belonged to this latter case.

The effect of this decision was that even when State officers can proceed to enforce a State statute only by judicial proceedings, yet if that statute is invalid the institution of such judicial proceedings by State officers may be such an injury or wrong against the railroad companies or those in-

terested therein, as to make those State officers proper defendants to a bill in equity seeking to restrain the enforcement of the rates. The decision made it clear that in a case justifying relief in equity a bill could be maintained against State officers to prevent the enforcement of an invalid statute or order whose enforcement would injure the plaintiff's rights, *simply upon a showing that those officers were proposing to enforce such statute or order by instituting and conducting mere judicial proceedings for such enforcement and without showing that such officers had threatened to commit any trespass or other act which if committed would be a basis for an action at law against them.* Of course there existed in this case an adequate basis for the claim that the particular State officers sued had a substantial connection with the enforcement of the order complained of.

The Court referred to the fact that the State had no pecuniary interest in the enforcement of the rates, but, as the Court pointed out, the existence of a pecuniary interest on the part of the State would not deprive the Court of jurisdiction to enjoin State officers from taking under an invalid statute wrongful action prejudicial to complainant and that such jurisdiction had been frequently maintained in tax cases.

Smyth vs. Ames, 169 U. S., 466:

In this case the legislature of Nebraska by statute in 1893 fixed rates on freight, and provided that if any carrier should violate that statute the carrier should be liable to the person injured for damages sustained, together with a reasonable attorney's fee, and upon conviction of violation should be fined in any sum not less than $1,000 nor more than $5,000 for the first offense and larger fines for the subsequent offenses. Stockholders of railroad companies brought suits in a Circuit Court of the United States against the railroad companies, the members of the Board of Transportation, and the Attorney General (who was also a member of the Board of Transportation) to prevent the enforcement of the rates.

The Circuit Court made, and this Court affirmed a decree, enjoining the railroad companies from observing, and the members of the Board of Transportation from enforcing the act, and separately and specifically enjoining the Attorney General *as Attorney General.*

> " from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, *mandamus*, civil action or indictment," because of any violation of the act.

This Court held that this was not a suit against the State, saying:

> " within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs " (p. 518).

Here likewise the only way in which the Attorney General or the members of the Board of Transportation could enforce the statute or injure or affect the railroad companies was by instituting judicial proceedings.

In this case the statute whose enforcement was enjoined did not impose any duty whatever upon the Board of Transportation, or upon the Attorney General, with respect to the enforcement of the rates prescribed by the statute. By a separate statute the Board of Transportation was given " general supervision of all railroads operated by steam in the state," and this provision constituted the only statutory connection between the Board of Transportation and the enforcement of the statute of 1893. The only connection which the Attorney General as Attorney General had with the enforcement of the statute was by virtue of his general duties to appear for the State and prosecute and defend all actions and proceedings in which the State should be interested as a party, and to consult with and advise the prosecuting attorneys in all matters pertaining to the duties of their office (Compiled Statutes of Nebraska 1893, ch. 72, art. 8, sec. 17 ; ch. 83, art. 5, secs. 1*a* and 3). Nevertheless there was such connection between the State officers sued and the enforcement by judicial proceedings of the statute complained of that the Court did not doubt the propriety of making those officers defendants to the suit.

Fitts vs. McGhee, 172 U. S., 516 :

In this case an Alabama Statute of February 9, 1895 (Alabama Laws 1894-1895, p. 375) prescribing rates of toll for a bridge at Florence, Alabama, was attacked, upon the ground that the statute impaired the obligation of a contract between the State and the bridge company, and that the statute would operate to deprive the bridge company of its property without due process of law. The

statute imposed for violation thereof penalties upon the bridge company recoverable only by the individuals aggrieved. *This was the only method provided in that statute or in any other law for the enforcement or administration of that statute.* No public officer was charged with any duty of supervision, administration, prosecution or enforcement under any law with respect to the statute in question.

The whole tenor of the act showed that, as in many other instances, the State had merely prescribed a rule of action for the benefit of individual members of a part of the public and had left the enforcement of that rule to those individuals. The statute evinced no suggestion of any policy to identify the State officers with the enforcement of the regulation. This situation was all the more natural in view of the purely local character of the regulation, affecting only traffic of a purely local or neighborhood character over a single bridge.

Under these circumstances no State officer was in the attitude of proposing to enforce, or was connected with the enforcement of, the statute against the bridge company. With no color of plausibility could the claim be made, which was properly made in *Pennoyer vs. McConnaughy, Reagan vs. Trust Company,* and *Smyth vs. Ames,* that particular State officers were about to enforce an invalid statute, and, therefore, those officers should be made defendants to a bill in equity and enjoined from taking such steps to the injury of the complainant. In the Alabama case there was a complete absence of any personal connection between any State officer and the bridge company with respect to the statute in question.

The Court emphasized this condition by calling attention to the Reagan case and to Smyth vs. Ames among other cases and saying :

> " Upon examination it will be found that the defendants in each of those cases were officers of the State specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which it was averred *they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights* " (p. 529).

The vital distinction, therefore, between the Reagan case and Smyth vs. Ames on the one hand, and Fitts vs. McGhee on the other hand, is the fact that in the two former cases the State

officers were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, and, therefore, had such a personal connection with the enforcement of that wrongful statute as to make them the proper subjects of injunction; whereas in the latter case it could not be claimed by any plausible pretense that any State officers were committing or were about to commit any such steps, and there was entirely lacking that personal connection on their part with the enforcement of the statute which would justify their being personally sued.

Under these circumstances the receivers operating the bridge elected to test the constitutionality of the statute in a proceeding against the State in its governmental capacity as a convenient representative of the people affected by the statute. Accordingly the suit was brought against the State of Alabama *eo nomine* and its Governor and Attorney General, and was confessedly a suit against the State "to test the constitutionality of the statute." Subsequently the suit was dismissed as to the State, but the character of the allegations against the Governor and Attorney General was not substantially changed, and the suit remained, what it was at the outset, a suit against the State.

In the case of *In re Ayers*, 123 U. S., 443, the Court decided that the suit could not be regarded as a suit against the defendant officers, because the statute they were about to enforce was constitutional, and hence their action in enforcing that statute could not be regarded as a personal wrong to the complainants. In *Fitts vs. McGhee* the Court decided that the suit could not be regarded as a suit against the Governor and Attorney General personally because they were not "about to enforce" the statute at all. In each of the cases the necessary result was that, as the suit could not be regarded as a suit against the officers personally, therefore it must be regarded as brought against them in their representative capacity.

The Court, holding that the case of *Fitts vs. McGhee* could not be regarded as a suit against the Governor and Attorney General in their personal capacity, but must be regarded as a suit against the State itself, summed up the whole case in the following passage:

> "If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor

and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. *If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong*" (p. 530).

We repeat that the vital point was that the Governor and Attorney General were not committing or attempting to commit the wrong of instituting judicial proceedings to enforce an unconstitutional statute, and, therefore, they could not be "individually proceeded against" to prevent such wrong.

It has been urged at times that this Court by its decision in *Fitts vs. McGhee* established the doctrine that a suit cannot be maintained to enjoin State officers from enforcing an unconstitutional statute unless the duty to enforce that statute is expressly imposed in the very statute which is claimed to be unconstitutional. Clearly no such construction can properly be given to the Court's opinion. The Court mentioned the fact that the Governor and Attorney General were not "specially charged" with the enforcement of the statute, but clearly this was done to emphasize the fact that those officers had no such personal connection with the enforcement of the statute as to render it proper to make them personal defendants. The fact that the officers were not specially charged with the enforcement of the statute was mere evidence proving or rather corroborating the view that they were not about to commit the wrong of enforcing the statute complained of. The Court's language did not express the idea, and cannot rationally be construed as implying the idea, that the wrong done to an individual by the enforcement of an unconstitutional statute may be prevented by a suit against the State officer enforcing the same where the duty to enforce the statute is expressly imposed by that very statute, but may not be prevented

where the duty is imposed by some other statute, or where the wrongful act of enforcement is committed simply by virtue of some general authority without any specific duty in regard thereto being in existence.

In none of the long lines of cases set forth on page 5 of this argument, where the doctrine of *Osborn vs. Bank of the United States* was applied, could a State officer sued have defended successfully upon the assertion, "I admit that I am about to enforce an unconstitutional statute to the destruction of the rights of the plaintiff, but I cannot be restrained from doing so because I am not specially charged with the enforcement of that statute." There can be no such qualification of the settled doctrine that "an officer of a State may be enjoined from executing a statute of a State which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant." Otherwise the State Legislature, to evade successfully the Constitution of the United States, needs only to embody its unconstitutional legislation in one statute and to embody the duty of enforcement in a separate statute, or to refrain from establishing any express duty of enforcement, leaving such enforcement to the action of the State officers in the exercise of their general powers.

Moreover, if such irrational qualification of the established doctrine on this subject be adopted it then follows that the cases of *Smyth vs. Ames* and *Prout vs. Starr* were incorrectly decided because the statute complained of in those cases imposed no duty with respect to its enforcement upon either the Board of Transportation or the Attorney General, and the only duty in regard thereto imposed upon the Board of Transportation was by virtue of the most general language in a much earlier statute merely giving the Board "general supervision" over the railroads of the State, and the only duty in regard thereto imposed upon the Attorney General was by virtue of general statutory provisions that it should be his duty to appear for the State and prosecute and defend actions in which the State should be interested as a party, and to consult with and advise the prosecuting attorneys in matters pertaining to the duties of their office.

Any assumption that the distinction between *Reagan vs. Trust Company, Smyth vs. Ames* and *Prout vs. Starr* on the one hand and *Fitts vs. McGhee* on the other lies in the fact that the officers in the latter case could not be enjoined because the only way in which

they could enforce the statute would be by the institution of judicial proceedings instead of by some specific act which could be regarded as a tort, is wholly unfounded, because the only possible wrong which could have been committed by the officers sued in *Reagan vs. Trust Company, Smyth vs. Ames or Prout vs. Starr*, was the institution and conduct of legal proceedings. The language of the Court in *Fitts vs. McGhee*, as well as its language in *In re Ayers*, upon the proposition that controlling the institution of judicial proceedings controls the action of the State itself, must be read in the light of the fact that in each of these cases the State was regarded, and properly regarded, as the real party sued, and it was simply pointed out that, being the real party sued, the issue could not be evaded by saying the process would operate merely upon State officers and not upon the State itself.

Any assumption that the decision in the case of *Fitts vs. McGhee* rested upon the idea that the suit must necessarily be regarded as a suit against the State, simply because it was only in the capacity of State officers that the officers sued could injuriously affect the complainant's rights, is likewise wholly at variance with practically every case where a suit against a State officer has been sustained, because in every such case the wrongful acts complained of could be committed by the officer only as the officer of the State. This is strikingly true of *Pennoyer vs. McConnaughy, Reagan vs. Trust Company, Smyth vs. Ames and Prout vs. Starr.* The theory underlying all these cases is that, notwithstanding the fact that the action is official, yet the official position does not protect the officer from being personally sued and enjoined where the action he is about to take is for the enforcement of an unconstitutional statute which will so injure the rights of the plaintiff as to entitle him to relief in equity.

We repeat that the vital distinction between the cases of *Reagan vs. Trust Company, Smyth vs. Ames* and *Prout vs. Starr* on the one hand and *Fitts vs. McGhee* on the other was that in the former three cases the officers sued were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, while in *Fitts vs. McGhee* the Governor and Attorney General could not by any plausible pretense be regarded as being "about to commit" any such wrong, and, therefore, the suit could not be viewed as a suit to prevent them personally from taking such official action to the injury of the complainants.

In the Minnesota proceeding the personal connection of the Attorney General with the enforcement of the invalid statute was perfectly clear. Not only was he identified with the general enforcement of the laws as to railroads by reason of his being *ex-officio* attorney for the Railroad and Warehouse Commission, and not only was the State's policy to enforce through its officers the rate statute involved in the injunction made clear by the drastic penalties therein denounced against the officers and agents of the railroad companies, but sec. 58, Revised Laws of Minnesota, 1905, provides that the Attorney General *shall* enforce the laws as to corporations. Moreover, the Attorney General's demurrer to the bill admitted the averment therein that he would "institute mandamus or other proceedings for the purpose of enforcing said acts" (one of them being the act of April 18, 1907) "and each thereof and the provisions and penalties thereof." Moreover, the petitioner when responding to the order of the Circuit Court to show cause why he should not be punished for contempt, sought to justify his action upon the ground that by the statutes of the State he, as Attorney General, was charged with the duty of instituting and conducting civil actions for the enforcement of its laws; that there was no other officer having the power to perform such duty; that defendant was obligated by his official oath to perform the duties of his office to the best of his ability; that he believed it to be his duty, as Attorney General, to commence said mandamus proceeding, and that the same was commenced solely for the purpose of enforcing the statute.

It would be difficult to make out a clearer case of direct connection of a State officer with the enforcement of a statute claimed to be unconstitutional. Here was the clearest possible case of an officer of a State proceeding to execute the statute complained of in the very manner which, under the doctrine of *Osborn vs. Bank of the United States* as applied in *Reagan vs. Trust Company*, would authorize suit and injunction against that officer.

A distinct branch of the decision in *Fitts vs. McGhee* was the decision that the prosecution of indictments in the State courts could not be enjoined under the peculiar circumstances presented in that case. Those circumstances were that after the suit had been brought indictments were found against one of the bridge toll men whereby he was charged with the violation, *not of the statute complained of as unconstitutional*, but of a section of the Alabama Code which imposed a penalty for charging more than a reasonable rate,

such rate to be fixed by a jury, *and the constitutionality of which section of the Code was not questioned in any way.* This section of the Code had not been attacked in the suit and was in no way involved therein, so that the indictments did not in any way relate to the subject-matter covered by the suit. After the State court had acquired complete jurisdiction of this new and distinct subject-matter arising under the indictments for the violation of the Code, the bill was amended so as to show these facts, the prosecuting solicitor was made a party defendant and an injunction was obtained restraining him from proceeding with these indictments. Under such circumstances this Court held that the injunction against the prosecuting attorney was an injunction against criminal proceedings in a State court contrary to section 720 of the Revised Statutes of the United States. This decision was entirely consistent with the decisions in *Reagan vs. Trust Company*, *Smyth vs. Ames*, and *Prout vs. Starr*, that in a suit in equity against appropriate defendants the court to protect the subject-matter thereby brought within its jurisdiction may enjoin the institution or conduct of all proceedings, either civil or criminal, which might otherwise be brought *thereafter* in the State courts.

The discussion in *Fitts vs. McGhee* of the injunction as restraining the prosecuting solicitor from prosecuting the indictments was based upon the doctrine stated by the Court in *In re Sawyer*, 124 U. S., 200 (which was a case not involving property rights), that in general a court of equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings because the jurisdiction of a court of equity is limited to the protection of property rights.

This Court, however, has clearly recognized that where property rights are involved a court of equity may enjoin the institution and prosecution of criminal proceedings.

In *Davis & Farnum Mfg. Co. vs. Los Angeles*, 189 U. S., 207, 218, the Court said:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

In *Dobbins vs. Los Angeles*, 195 U. S., 223, 241, the Court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Davis & Farnum Mfg. Co. vs. Los Angeles*, 189 U. S. 207, 218, and cases therein cited."

The doctrine of the two cases last mentioned could not apply to the injunction against the indictments in *Fitts vs. McGhee*, because in that case the indictments were found under a statute whose constitutionality was not questioned.

The Court, in discussing this subject in *Fitts vs. McGhee*, referred also to the case of *Harkrader vs. Wadley*, 172 U. S., 148. In that case the Court (p. 163) distinctly limited its decision to a case where the criminal proceedings sought to be restrained were conducted "under a State statute *not repugnant to the Constitution or laws of the United States*," and on page 164 said:

> "In the present case it is not contended that the State statute under which the county court of Wythe county was proceeding, was repugnant to the Constitution or any law of the United States, or that the State did not have jurisdiction of the offense charged and of the person of the accused."

Cotting vs. Kansas City Stockyards Co., 183 U. S., 79:

In this case stockholders of the Stockyards Company brought suit against the Stockyards Company and the Attorney General of Kansas to prevent the enforcement of rates prescribed by a Kansas statute, upon the ground that such statute was unconstitutional and its enforcement would violate the rights of the complainant. The point was made that as to the Attorney General the suit was against the State. This Court declined to examine that proposition, holding that it was unnecessary to do so. The Court held the statute unconstitutional and directed the Circuit Court to render a decree perpetually enjoining the Stockyards Company from observing the rates fixed by statute, and directed that the bill as to the Attorney General be dismissed without prejudice. The case, therefore, throws no light upon the question as to what is and what is not a suit against the State. The case, however, has a most significant bearing upon the proposition to be hereinafter discussed

that the Attorney General of Minnesota was in any event bound to respect the injunction granted by the Circuit Court against the other defendants.

Prout vs. Starr, 188 U. S., 537:

This case was similar to *Smyth vs. Ames*, and contained an emphatic reiteration of the authority and duty of the courts of the United States to entertain suits against State officers to prevent the enforcement by them of statutes which were contrary to the Constitution of the United States.

In this case the Court said (p. 543):

> "It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment."

There is no other case which involves any question as to a suit against an Attorney General.

The general doctrine was, however, reiterated as follows in the case of McNeill vs. Southern Railway Company, 202 U. S., 543, 559:

> "We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not in any proper sense one against the State."

The cases of *Reagan vs. Trust Company, Smyth vs. Ames* and *Prout vs. Starr* were again cited and relied upon in *Mississippi Railroad Commission vs. Illinois Central R. Co.*, 203 U. S., 335, 340.

There is, of course, no peculiar significance attaching to the office of Attorney General. The settled doctrine of this Court is that any officer of a State may be enjoined from executing a statute which is in conflict with the Constitution

of the United States when such execution would violate and destroy the rights and privileges of the complainant. This doctrine, as repeatedly applied by this Court means that any State officer may be enjoined from instituting or conducting any sort of judicial proceeding to enforce the statute complained of, provided he has a substantial connection with the enforcement of the statute in question. The fact that the officer is specially charged by the particular statute or by any other statute with the duty of enforcing the particular statute, or is generally charged by the general provisions relating to his office with the duty of enforcing statutes of that character, furnishes presumptive evidence that the officer has a substantial connection with the enforcement of the statute, but the absence of any express duty whatever in the premises would not exempt the officer from the process of the courts of the United States if in fact he was about to enforce a statute violative of the Constitution of the United States. However, in the present case, the personal connection of the petitioner with the enforcement of the statute in the court's interlocutory order is perfectly apparent, because he was specially charged with the enforcement of the statute in a more direct manner than were any of the officers enjoined in Smyth vs. Ames and Prout vs. Starr, and because in fact he was about to take steps to enforce the statute. The suit was not brought against him simply in order to make the State a defendant to represent the public, but it was brought against him to prevent him from enforcing the statute.

Discussion of Arguments on Behalf of Petitioner.

Throughout the argument on behalf of petitioner runs the fallacy that if the State officer has a discretion as to whether he will or will not institute a proceeding, the possession of such discretion exempts him from suit by the individual who would be injured by the institution of that proceeding. Reduced to its last analysis, this contention may be stated as follows: If a State legislature itself exercises a discretion and specifically declares that a State officer shall execute an unconstitutional statute then the officer may in a proper case be enjoined from instituting that proceeding; but if the State legislature instead of itself exercising that discretion delegates that discretion to the State officer and allows him to decide whether he shall or shall not institute such judicial proceeding, then no matter how clearly it may appear that the officer is about

to institute such proceeding he is exempt from injunction and suit because he is vested with a discretion. In other words, the delegated discretion is an absolute barrier to the remedy, whereas the discretion exercised by the legislature itself simply paves the way for the remedy!

Counsel have evidently confused the cases where State officers have been sued to compel them to do acts required by State statutes with cases where State officers have been sued to prevent them from committing wrongful acts under color of unconstitutional statutes. Of course where affirmative action is sought in accordance with a State statute the suit against a State officer can be maintained only when the act is purely ministerial, because if the act is discretionary the court could not control it without interfering with and indeed usurping a function of the State itself, and therefore, a suit for such purpose would be a suit against the State; but where the action is instituted to prevent a threatened wrong, then it is utterly immaterial whether the officer threatening to do that wrong is absolutely compelled by the statute to commit it or is simply given the discretion by statute to commit it. Undoubtedly in many of the cases where suits against State officers to prevent threatened wrongs under unconstitutional statutes have been upheld the officers had a wide discretion as to whether they would or would not adopt the course complained of.

But in the present case there is no discretion. Section 58 of the Revised Laws of Minnesota, 1905, says that the Attorney General "shall cause proceedings to be instituted against" any corporation offending against the laws of the State, and the petitioner's return to the order to show cause why he should not be punished for contempt discloses that he felt that he must enforce the statute whose enforcement had been enjoined.

Petitioner's counsel apparently suggest that the court in any event has no right to enjoin the institution by or on behalf of the State of a mandamus proceeding to compel obedience to a State statute. This argument apparently confuses two distinct ideas. If the argument be predicated on the theory that some particular sanctity attaches to a mandamus proceeding by the State and that therefore a suit seeking among other things to prevent a mandamus proceeding on behalf of the State would, for that reason, be a suit against the State, the argument is at variance with the authorities as to what is and is not a suit against the State. A State officer proceeding to enforce an unconsti-

tutional statute may in a case of which equity has jurisdiction be enjoined from instituting any judicial proceedings to enforce such statute whether such proceedings be by way of mandamus or other civil proceeding, or by way of some penal or criminal proceeding. In *Smyth vs. Ames* the Attorney General of Nebraska was specifically enjoined from instituting any proceeding by way of mandamus to compel obedience to the statute in question. If, however, the argument be based upon the theory that a court of equity will not enjoin the institution of a mandamus proceeding because no multiplicity of actions would be involved in the event the mandamus proceeding were not enjoined, the argument is not applicable here because the court of equity clearly has jurisdiction of this action to prevent a great multiplicity of other proceedings, and certainly has the right to embrace within its jurisdiction a mandamus proceeding which if not embraced would utterly defeat any other exercise of its jurisdiction which the court might attempt to make.

Petitioner's counsel urge the following suggestions :

That the suit is against the State because complainants " cared nothing whatever about any action which Mr. Young might take or any suit he might bring as an ordinary individual."

That the State may " arrest an offender against the law, or it may proceed against him by mandamus, and in either case the institution of the suit is an act of the government which cannot be restrained."

That "as the burden of an increase in rates falls entirely and directly upon the people, it falls upon the State, for the people are the State. From the standpoint of 'pecuniary' interest alone, the State is interested in nothing more than it is in the transportation charges paid by its people."

That there was no jurisdiction as to the petitioner because "no act injurious to another in regard to person or property has been done or was threatened," and that the petitioner was not as to the plaintiff "a personal wrongdoer."

Each of the foregoing arguments, if valid, would have defeated the jurisdiction of the Federal Courts with respect to State officers in every one of the rate cases. In none of these cases did the complainants attach any importance to the action of the defendants who were State officers, except to such action as those defendants might take by virtue of their authority as State officers. In every one of those cases the right of the State to proceed either civilly or crim-

inally against the railroad company for violation of the invalid statute or order was substantially interfered with and indeed prevented. Even if the State had a pecuniary interest in the matter (as it has had in practically all the suits against State officers except the suits to enjoin the enforcement of rates), that fact would not prevent the Court from restraining State officers from executing a statute which is repugnant to the Constitution of the United States; besides it was distinctly declared in *Reagan vs. Trust Company* and reiterated in *Missouri*, etc., *Company vs. Missouri*, etc., *Railroad Commissioners*, 183 U. S., 53, that the State has no pecuniary interest in rates fixed for a railroad company. In every one of the rate cases the defendant State officers were "personal wrongdoers" only in the sense in which the petitioner herein was a "personal wrongdoer." Each of the State officers in those cases was a "personal wrongdoer" solely in the sense that he was regarded as a prospective wrongdoer, because connected with the enforcement by judicial proceedings of the statute or order complained of, and there can be no dispute whatever that the petitioner herein was a "personal wrongdoer" in that sense.

Petitioner's counsel fail to advance a single argument against the jurisdiction here which if sound would not have defeated entirely the jurisdiction in *Reagan vs. Trust Company*, in *Smyth vs. Ames*, and in all other similar cases.

II.

Petitioner in Any Event Was in Contempt of Court.

But, even if as to petitioner the suit was a suit against the State and there was no basis for an injunction directed against him, yet the Court had made a valid order as to the other defendants and as to the subject matter, and petitioner, with knowledge of that order, took action to defeat the purpose of the order, and was, therefore, guilty of a contempt.

THE QUESTION WHETHER A LEGISLATIVE ENACTMENT FIXING RATES AFFORDS JUST COMPENSATION IS A QUESTION FOR JUDICIAL DETERMINATION.

In *Chicago, etc., Company vs. Minnesota*, 134 U. S., 418, 458, the Court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws."

In *Reagan vs. Farmers' Loan & Trust Company*, 154 U. S., 362, 397, 399, the Court said:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered because, the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is

preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers ; they do not engage in any mere administrative work ; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." * * * (Page 397).

" These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulatiou of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property " (p. 399).

In *Smyth vs. Ames*, 169 U. S., 466, 526, 527, the Court said :

" While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry " (526).

" But despite the difficulties that confessedly attend the proper solutiou of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the State has declared such to be the case ; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary not-

withstanding. Art. VI. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land" (527).

In Chicago, Milwaukee, etc., R'y vs. Tompkins, 176 U. S., 167, 172, the Court said:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in Yick Wo v. Hopkins, 118 U. S., 356, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burden-

some as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution.' "

A SUIT IN EQUITY IS AN APPROPRIATE MODE OF TRYING THIS JUDICIAL QUESTION.

The propriety of a suit in equity for this purpose was pointed out by Mr. Justice MILLER in his concurring opinion in *Chicago, etc., Railway Company vs. Minnesota*, 134 U. S., 418, as follows:

> " 6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.
>
> " 7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method " (p. 460).

The jurisdiction of a court of equity with respect to this question has been recognized in a great many cases and the practical necessity for resort to such jurisdiction has been emphatically pointed out in the following, among other cases: *Smyth vs. Ames*, 169 U. S., 466, 517; *Detroit vs. Detroit Citizens' Street Railway Company*, 184 U. S., 368, and *Cleveland vs. Cleveland Street Railway Company*, 194 U. S. 517.

In addition to the complex character of the questions involved with which the machinery of a court of law cannot adequately deal and in addition to the multiplicity of actions, prosecutions and controversies which can only be avoided by a comprehensive proceeding in equity a further important reason for resort to a court of equity in such cases is the practical and indeed legal necessity for uniformity in the rates of railroad companies. One of the most important principles of public policy underlying the regulation of

railroad rates is the principle that the same rates shall be charged to all persons under similar circumstances. If the validity of a statutory schedule of rates is to be questioned, the only method in which that question can be tested so as to conserve this important principle of public policy is to have the question heard and determined in some proceeding which will be binding upon all parties interested in the rates and which will insure uniformity of action with respect to all persons.

A CIRCUIT COURT OF THE UNITED STATES IS AN APPROPRIATE TRIBUNAL TO HEAR AND DETERMINE A SUIT IN EQUITY INVOLVING THIS JUDICIAL QUESTION.

In *Reagan vs. Farmers' Loan & Trust Company*, 154 U S., 362, 391, the Court said :

> " Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts " (391).

In Smyth vs. Ames, 169 U. S., 466, 516, the Court, responding to the suggestion that the remedy in the State courts prescribed by the Nebraska act was exclusive, said :

> " We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the

established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States (Citing authorities). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction" (p. 516).

The statute to which the order of the court below relates provides that any officer, director, agent or employee who violates any of the provisions of the statute or counsels, advises or assists any such railroad company to violate the same shall be guilty of a misdemeanor and may be prosecuted therefor in any county into which its railroad extends and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days. Therefore, if the railroad company or its stockholders could not resort to a bill in equity, but wished to question the constitutionality of the statute, the result would be that a great number of the officers and agents of the company, indispensable to the operation of the railroad, would be subject to arrest and imprisonment; and if the State carried out the policy prescribed by its Legislature the result would be a partial paralysis and perhaps a complete paralysis of the whole transportation service of the railroad company, including its transportation of the United States mails and its transportation of interstate passengers and property. When we recall the emphatic position taken by this Court in the case of *In re* Debs, 158 U. S., 564, to the effect that the powers of the Circuit Courts of the United States, as courts of equity, may be exercised to prevent any obstruction of the United States mails or of the channels of interstate commerce, it seems peculiarly appropriate that the Circuit Courts of the United States should be appealed to in cases like this to the end that there may be an orderly determination of the rights of the persons interested in the railroad companies affected by the statute.

IN SUCH A SUIT ALL PERSONS INTERESTED CANNOT BE MADE PARTIES TO THE SUIT.

While the Circuit Courts of the United States have heard and determined a great many suits in equity dealing with the reasonableness of rates prescribed by or under legislative enactment, it has never been true in any of those cases that every person interested in the controversy was a party to the suit.

The only parties, other than the carrier, who are pecuniarily interested in the questions are the shippers and passengers.

In *Reagan vs. Farmers' Loan and Trust Company*, 154 U. S., 362, 390, the court dealing with the question as to what parties were substantially interested in the controversy as to the validity of the rates attacked, said :

> " Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property." (page 390.)

In *Missouri, etc., Railway Company vs. Missouri Railroad, etc., Commissioners*, 183 U. S., 53, the Railroad Commission of Missouri brought suit against the railway company in a State Court to enforce an order of the commission requiring the discontinuance of certain rates held to be excessive. The railway company on the ground of diverse citizenship sought to remove the case to the Circuit Court of the United States. Such removal was denied by the State court upon the ground that the real party plaintiff was the State of Missouri and, therefore, a removal was not authorized because the State was not a citizen within the meaning of the " Removal Acts." The case was brought to this Court upon writ of error, and the judgment of the State court was reversed upon the ground that the removal should have been allowed because the State was not the real party plaintiff. The Court said :

> " It is not an action to recover any money for the State. Its results will not enure to the benefit of the State as a State in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and

charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate'" (p. 59).

Although in many cases the Circuit Courts of the United States have dealt comprehensively with the question of the reasonableness of rates, all the real parties in interest, to wit, the shippers or passengers, have, of course, not been before the court.

In *Reagan vs. Trust Company*, the defendants were the railroad companies, the members of the Railroad Commission and the Attorney General. No shipper was a party, although the shippers were interested in the rates charged them by the railroad companies, and in addition, were interested in the statutory penalties recoverable in their own names. In *Smyth vs. Ames*, the defendants were the railroad companies, the members of the Board of Transportation and the Attorney General. No shipper was a party, although the shippers, in addition to being pecuniarily interested in the rates charged them, were also given by statute an attorney's fee in any action brought against the railroad company for charging more than the statutory rates. No county attorney was a party, although the county attorneys throughout the State had the right to enforce the statute by conducting proceedings to recover the penalties prescribed by the statute. In *Chicago, &c., Co. vs. Tompkins*, 176 U. S., 167, the defendants were the Railroad Commission and the Attorney General. No shipper was a party although interested in the rates. In *Cotting vs. Kansas City Stock Yards Co.* the defendants were the Stock Yards Company and the Attorney General. None of the persons interested in the charges made by the Stock Yards Company was a party and this Court acted upon the assumption that it was not necessary for the Attorney General to be a party, directing a dismissal of the suit as to him without prejudice while directing the entry of a decree perpetually enjoining the Stock Yards Company from observing the statutory rates. The case of *Prout vs. Starr*, 188 U. S., 537, was similar in all respects to *Smyth vs. Ames*.

BUT IN EVERY SUCH SUIT THE COURT HAS PROCEEDED ON THE THEORY THAT IT WAS IN CONTROL OF THE ENTIRE SUBJECT MATTER.

Yet in every one of the cases mentioned the Court proceeded upon the assumption that it was in a position to control the whole subject matter before it and to give the railroad company full relief.

In *Smyth vs. Ames*, 169 U. S., 466, 517, the Court said:

> "Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, *can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute.* The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a mutiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. *The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency* and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the

quasi-public corporation by which the highway is maintained."

The case of *Detroit vs. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, was a suit by the Railway Company to restrain defendants from enforcing ordinances reducing rates of fare. The Court held that a court of equity had jurisdiction and said :

"Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

"The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom, and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned ; such belief being based upon the existence and terms of such ordinances.

"The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinance of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. *An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.*" (pp. 379, 380.)

The Court pointed out that no penalties were fixed in the ordinances and quoted from *Smyth vs. Ames* to the effect that the transactions of a single week would expose the company to a vast number of suits to say nothing of the heavy penalties. The Court held the same principle applied although no penalties were provided. The Court further said :

"It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and *once for all and thus a multiplicity of suits and other complications prevented.*

"Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law (and no such objection has been taken at any time, and has not been insisted upon before us), we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it."

The case of Cleveland vs. Cleveland City Railway Co., 194 U. S., 517, was a similar case. Upon the subject of jurisdiction in equity the Court said :

"Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion,

> risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates over the same line, leading to consequences dangerous to the public interest, peace and tranquility, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in Detroit vs. Detroit Citizens' Street R'y Co., 184 U. S., 368" (p. 531).

None of the persons interested in the rates charged by the railway company and entitled to assert a cause of action for any results flowing from insistence by the company or charging in excess of the legal rate was a party to either of the suits last referred to.

In all the cases quoted the idea was clearly expressed, and in all similar cases which have arisen the idea has been necessarily implied, that the court, by virtue of the proceeding before it, had jurisdiction of the subject matter with which it was dealing and had authority to prevent all the confusion and controversies and multiplicity of civil actions and criminal prosecutions which would arise but for the assumption by a court of equity of jurisdiction over the entire subject matter.

THE SUBJECT MATTER OF SUCH A SUIT CAN BE COMPLETELY DEALT WITH WHENEVER APPROPRIATE DEFENDANTS ARE BEFORE THE COURT.

It necessarily follows from the nature of the subject and from the way in which that subject has been considered and dealt with by this Court, that the question whether a set of rates prescribed by or under legislative authority and alleged to violate the constitutional rights of the railroad company shall be enforced constitutes a single subject matter which can be and ought to be heard and determined in a single equitable proceeding which will bind all parties. Upon any other assumption all that has been done by the courts in

this direction would have been futile. If the decrees granted by the courts in the cases which have arisen were binding only upon the persons who were defendants in those proceedings, and if every other officer or individual was left free to assert in the State courts any authority or right possessed by him under the statutes or at common law the result would have been that every decree ever entered in any such case could have been nullified.

The underlying theory of the decisions of this Court upon this subject has been that the subject matter was one affecting the interests of a vast number of persons, all of whom could not possibly be brought into court, but that at the same time equitable principles and public policy require that the subject matter shall be comprehensively and conclusively dealt with in a single proceeding and that such proceeding may be maintained and the entire subject matter completely disposed whenever there are appropriate defendants and the court is justified in assuming that the interests of both side of the controversy are fairly represented.

THE COURT BELOW HAD APPROPRIATE DEFENDANTS BEFORE IT AND HAD AUTHORITY TO DEAL WITH THE ENTIRE SUBJECT MATTER.

We submit that the suit of *Perkins et al. vs. Northern Pacific Railway Company, et al.*, comes fully within the principles stated.

As a suit by stockholders to restrain the corporation from complying with an unconstitutional statute where compliance would irreparably impair the rights of the stockholders, the suit is exactly parallel to the cases of *Smyth vs. Ames*, *Cotting vs. Kansas City Stock Yards Co.* and *Prout vs. Starr*.

In *Cotting vs. Stock Yards Co.* this Court directed the entry of a decree perpetually enjoining the Stock Yards Company from complying with the rates prescribed by the Kansas statute and at the same time directed the dismissal without prejudice of the suit as to the Attorney-General. This was a distinct recognition of the proposition that the corporation alone constituted a sufficient defendant, provided, of course, the case was not of the character condemned in *Chicago, etc., Ry. Co. vs. Wellman*, 143 U. S., 339, as a mere friendly suit.

As a suit against representatives of the shippers, who alone are the persons having a pecuniary interest in the subject antagonistic to the railroad companies, this suit brought the subject matter fairly and fully before the court.

If, as has been clearly established ever since *Osborn v. Bank of the United States*, a public officer may be enjoined from exercising his public authority to enforce an unconstitutional statute, certainly a private individual may in a case justifying equitable interposition be restrained from exercising his private right to enforce an unconstitutional statute. In McNeill vs. Southern Railway Co., 202 U. S., 543, the individual shipper interested, as well as the Commission, was enjoined from enforcing the unconstitutional order of the Commission. If such a right exists as against a single shipper or as against a few shippers, the right certainly is not lost because the individuals who may enforce the statute are so numerous that all of them cannot be brought before the Court. On the contrary the greater the number of individuals having the the right to sue or take other steps to enforce compliance with an unconstitutional statute, the greater the necessity for the intervention of a court of equity to protect the property rights menaced by the enforcement of such a statute, and in any such case a suit is proper against a few as representatives of the class, the court being satisfied, as pointed out in Story on Equity Pleading, section 123, that "sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest."

In *Chicago, etc., Company vs. Dey*, 35 Fed. Rep., 866, the court pointed out that there was no difference, save in magnitude, between a dispute over the legal rate of fare for a single transaction between a carrier and its passenger and a suit wherein all transactions would be involved rather than a single one. Clearly, therefore, a court of equity has the power to entertain a suit against proper representatives of the shippers or passengers interested in a statutory rate to restrain the enforcement of that rate if it is in violation of the constitutional rights of the railroad company.

Indeed this latter method of bringing these important constitutional questions before the court is becoming of increasing importance in view of the avowed purpose of some State Legislatures to frame statutes reducing rates in such a way as to remove entirely any connection of any public officer with the enforcement of the statute and to leave the enforcement of the statute purely in private hands and in many instances through the imposition of heavy penalties recoverable only by the individuals aggrieved. If a suit cannot be maintained against persons fairly selected as the representatives of these individuals so as to prevent them from enforcing an unconstitutional statute, then it will be contended that the Consti-

tution of the United States has been successfully evaded and the lawful jurisdiction of the Courts of the United States has been successfully circumvented.

Therefore, even if the Attorney General had no such connection with the enforcement of this statute as to make him an appropriate defendant the court still had jurisdiction of the subject matter because the corporation was a proper defendant and because the individual shippers were appropriate defendants as the fair representatives of the only class of persons, other than the railroad company and those interested therein, who were pecuniarily interested in the rates fixed by the statute.

The Court Below Made a Valid Order and the Petitioner Sought to Prevent the Enforcement of that Order.

Thus there is presented a situation where a Circuit Court of the United States sitting in equity and with lawful jurisdiction of a single subject matter, to wit, the question whether certain rates prescribed by statute shall or shall not be enforced, makes a decree for the protection of the property interests involved. This decree was similar in all respects to decrees repeatedly entered in other cases, such as *Reagan vs. Trust Company*, *Smyth vs. Ames*, and *Prout vs. Starr*. In this situation an individual with full knowledge of the decree entered by the Court institutes a proceeding the only possible result of which, if successful, would be utterly to destroy the effect of the decree entered by the Federal Court.

The action instituted by the petitioner in the State Court was designed to compel the Northern Pacific Railway Company to comply with the statute and to charge to all shippers no more than the statutory rates although this consequence was the very thing which the Court below had decided ought to be prevented pending the further order of the Court and by a valid order the Court below had so directed. That order could not be complied with and the decision of the Court with respect to the subject-matter could not be carried out if the Attorney General were permitted to institute and prosecute the mandamus proceeding.

Briefly stated, the situation is that a Federal Court makes a decree with respect to a matter of which it has jurisdiction and a person not a party to the suit but with knowledge of the decree deliberately attempts to thwart the enforcement of that decree.

Such Action by a Person Not a Party to the Suit is a Contempt of Court.

It is well settled that a person who, with notice of an order of a court, violates or seeks to prevent the enforcement of such order, is guilty of contempt, though not a party to the suit in which the order was rendered.

In *In re Lennon, 166 U. S., 548*, the Court decided that a person not a party to the suit nor actually served with a copy of the injunction rendered therein might be punished for contempt of the injunction. The Court said :

> "The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice (High on Injunctions, § 1444 ; *Mead v. Norris*, 21 Wisconsin, 310 ; *Wellesley v. Mornington*, 11 Beav., 181 " [p. 554]).

In *In re Reese*, 107 Fed. Rep., 942, the Circuit Court of Appeals for the Eighth Circuit held that a person not a party defendant nor within the terms of an order granting a temporary injunction may be punished for contempt, subject to the limitations of section 725 of Revised Statutes of the United States, where he intentionally interferes to thwart the court in enforcing such order. The court quoted section 725 as follows :

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority ; provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior

of any of the officers of said courts in their official transaction, and the disobedience or resistance of any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree, or command of the said courts" (p. 945).

and said:

"This section undoubtedly confers ample power upon the court to punish any person for intentional resistance to any of its orders. The word 'disobedience' aptly applies to a party or other person against whom an order is made. The word 'resistance' manifestly is applicable to a party to the suit, and may be applicable to 'other persons' referred to in the section. *It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purpose of the court in making such order. Such an act, independent of its effects upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order.* Such contempts, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court. The power to punish for contempt is not limited to cases of disobedience by parties to the suit of some express command or rule against them, but, subject to the limitations imposed by section 725, *supra*, is co-extensive with the necessity for maintaining the authority and dignity of the court" (p. 945).

In *Chisolm vs. Caines*, 121 Fed. Rep., 397, the Circuit Court for the District of South Carolina held as follows:

"A person may be guilty of contempt of court in doing an act which he knows the court has prohibited by injunction as by willfully trespassing on lands, with knowledge that the court has adjudged them to be private property, and had enjoined the defendants in the suit, and 'all persons whomsoever,' from trespassing thereon—although he was not a party to the suit, and is neither the agent or servant of, nor in privity with, any of the parties. In such case he is not technically guilty of a violation of the injunction, but of an independent act of disrespect to the court, and disregard of its decree, which constitutes a contempt of the court, and may be punished as such without reference to its effect upon the rights of the suitors."

In *Bessette vs. Conkey*, 194 U. S. 334, this Court recognized the principle that a person having knowledge of an injunction granted in a suit although not a party to the suit will be guilty of contempt of court if he takes action to defeat the court's injunction. Among other things the Court said:

"In *In re Nevitt*, 54 C. C. A., 622, 632; 117 Fed. Rep. 448, 458, Judge SANBORN, of the Court of Appeals for the Eighth Circuit considered the nature of contempt proceedings at some length. We quote the following from his opinion:

'Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. (Citing authorities.) A criminal contempt involves no element of personal injury. It is directed against the power and

> dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings.' 'See, also Rapalje on Contempts, sec. 21.' * * *
>
> "In the case at bar the controversy between the parties to the suit was settled by final decree and from that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet being no party to the suit he was found guilty of an act in resistance of the order of the court. His case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpœna, as among those acts primarily directed against the power of the court, and in that view of the case we pass to a consideration of the questions presented" (pp. 327-330).

The Court then held that there was a right of appeal from a judgment punishing a person for criminal contempt.

A recent and interesting illustration of the power of a court to punish a person for contempt who though not a party is guilty of an act tending to defeat the process of the court is afforded by the case of *United States vs. Shipp*, 203 U. S., 563, wherein this Court indicated that a sheriff conniving at the lynching of a person who was under sentence of death and whose case was pending upon writ of error in this court would be guilty of contempt.

The fact that the action taken by the petitioner consisted in instituting a judicial proceeding in another court does not detract from its character as a contempt of court. The very purpose of all the bills in equity entertained by the Federal Courts to restrain the enforcement of unconstitutional rates has been to prevent the institution and conduct of judicial proceedings in other courts for the purpose of enforcing those rates, because neither the defendants to

such bills nor any other persons had any power to enforce those rates except by the institution of judicial proceedings. Therefore the step taken by the petitioner was precisely the character of step which it was necessary to restrain and which in similar cases has been restrained in order to effectuate the jurisdiction of the court and uphold and enforce the Constitution of the United States.

THE FACT THAT PETITIONER WAS ATTORNEY-GENERAL AND ACTED UNDER COLOR OF AUTHORITY OF THE STATE IS NO PROTECTION TO HIM.

The fact that the petitioner was Attorney General and instituted the mandamus proceeding by virtue of the authority vested in him as Attorney General affords the petitioner no protection. Any person who attempts to thwart the valid decree of a federal court places himself in opposition to the Constitution and laws of the United States and no State office and no State authority can afford any protection from the consequences of such unlawful action.

Upon this point we quote the emphatic language of this Court in *In re* Ayers, 123 U. S., 443, 507 :

> "Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped

> of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

We, therefore, submit that the petitioner was in any event guilty of a contempt of court, for which he was properly punished. If, notwithstanding the fact that the court below had jurisdiction of the other parties and of the subject matter, the petitioner had the right to institute the mandamus proceeding which, if effective, would have absolutely nullified the process of the Federal Court, then it follows that there never has been, and never can be, a case where the Federal Courts can extend to property that protection from unconstitutional invasion which this Court has repeatedly said the Federal Courts can and ought to extend.

III.

There can be no adequate remedy with respect to the rate statute involved here unless all judicial proceedings for its enforcement can be restrained.

It is advisable to consider the provisions of the rate statute here involved in order fully to appreciate the necessities of this case. Section 6 of the Act of April 18, 1907, requires the observance of the rates fixed by the act, and provides that any officer, director, agent or employe of any railroad company who violates any of the provisions of the section, or who causes, or counsels, advises, or assists any such railroad company to violate the same shall be guilty of a misdemeanor and may be prosecuted therefore in any county into which its railroad extends and in which it has a station, and upon conviction thereof may be punished by imprisonment in the county jail for a period not exceeding ninety days.

If the Attorney General can institute and conduct a proceeding for mandamus to compel compliance with the statute then clearly prosecutions against the officers and agents of the company may be begun under section 6 of the statute, and indeed it is urged in the argument on behalf of petitioner

that the State has the right to elect whether it will proceed civilly or criminally, and that it is a defiance of the sovereignty of the State for persons interested in a railroad company to adopt the course adopted in the suit in the court below "instead of waiting to be proceeded against in a suit by the State at a time and in a tribunal chosen by it." Petitioner's counsel further say that the State "having the power to enact the laws, it has the power to commence actions either civilly or criminally for their enforcement. It may arrest an offender against the law, or it may proceed against him by mandamus. In either case the institution of the suit is an act of the government which cannot be restrained."

While the proceeding actually instituted by the Attorney General was a mandamus proceeding, still the right to institute that proceeding notwithstanding the court's injunction must be tested by reviewing the consequences to flow from the institution of criminal proceedings, because the latter may be instituted if the former may be.

Moreover it seems to be intimated by petitioner's counsel that a proper method of judicial review of a statute fixing railroad rates is by way of a criminal prosecution wherein the defendant may claim that the rates fixed violate the Constitution.

THE PENAL PROVISIONS OF THE RATE STATUTE IF ENFORCEABLE WOULD PREVENT ANY JUDICIAL REVIEW WHATEVER.

If a legislature enacts a statute prescribing certain rates and imposing a penalty either of fine or imprisonment upon the railroad company's officers and agents for each instance in which a higher rate is charged, no remedy to test the constitutionality of the statute by way of defense in criminal prosecutions for violation of the statute can arise except after a disobedience of the statute by the railroad company and its agents. If the officers and agents of the company disobey the statute and are prosecuted for such disobedience and fail in their defense they will be imprisoned for the act of disobedience, notwithstanding the fact that their disobedience was in the utmost good faith for the sole purpose of obtaining a judicial review. In other words, if the judicial review must be by way of defense to an indictment the act of disobedience is a necessary prerequisite to any exercise of the company's constitutional rights of testing the statute, and the company and its agents can only take that step for the purpose of testing the statute

by incurring the risk of imprisonment in the event the defense is unsuccessful.

It may be proper to point out that statutory regulation of this character is not the same as a mere police regulation prohibiting a person from making a use of his property which is injurious to other people. Here the proposition is to require the company to employ its property in a legitimate calling for the benefit of other people and to give the use thereof for a compensation fixed by the legislature. The question whether that compensation is just and reasonable under the Constitution is a question which the courts and not the legislatures have the final right to decide. It has been repeatedly held that the railway company has a right to obtain a judicial determination of this question in the courts of the United States. This is an incident which goes with every regulation of this character.

In *Chicago, etc., Co. vs. Tompkins*, 176 U. S., 167, 173 the Court, in pointing out the right of the company to a judicial consideration of this subject used this illustration :

> "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision ; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation ; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

Clearly the legislature could not exercise the right of eminent domain by designating specific property to be taken, specifying the price to be paid therefor and declaring that the owner should be guilty of a crime if he declined to accept that price, and if upon resorting to the court he failed to satisfy the court that the legislative price was wrong. For similar reasons a railroad company may not be confined to any such method of judicial review with such a penalty in the event it does not succeed in such judicial review.

The unconstitutionality of a statutory provision for penalties having the effect in this way to hamper judicial review was pointed out by Mr. Justice BREWER in the case of *Cotting vs. Kansas City Stock Yard Co.*, 183 U. S., 79, 99.

Four Circuit Courts have distinctly held that such penalties for the enforcement of statutes prescribing rates are unconstitutional, on account of the tendency of such penalties to obstruct the resort to the courts to which the railroad companies are entitled.

Mercantile Trust Co. vs. Texas & Pacific R'y Co., 51 Fed. Rep., 529.
Louisville & Nashville R. Co. vs. McChord, 103 Fed. Rep., 216.
Consolidated Gas Co. vs. Mayer, 146 Fed. Rep., 150.
Ex parte Wood, 155 Fed. Rep., 190.

IT WOULD BE IMPRACTICABLE IN A CRIMINAL PROSECUTION TO MAKE AN ADEQUATE DEFENSE ON THE GROUND THAT THE STATUTORY RATE IS UNREASONABLY LOW.

The utter inadequacy of the machinery of the criminal courts to determine questions of this character makes it extremely unreasonable to suggest any such method of judicial review, even if there were not the added vice of the heavy penalties.

In *Winsor Coal Company vs. Chicago & A. R. Co.*, 52 Fed. Rep., 716, the court pointed out that the legislature had established maximum rates, and had provided for the further fixing of rates by the Railroad Commission, and held that an action could not be maintained for the excess over a just and reasonable rate when the rate charged did not exceed the rate fixed by the statute or by the Commission, and said :

> " What in the judgment of one jury in one locality would be an unreasonable charge might in the opinion of another jury in another locality be quite reasonable. With the known capriciousness of jury verdicts, influenced often by individual peculiarities, mental habits, the quantum and quality of the evidence in the particular case, how would it be possible to carry out the legislative intent to establish and maintain a uniform rate of charges? Would not the diversity of conclusions reached by different juries between different litigants in and of itself bring about discrimination and inequality? Under such a

construction of this statute as contended for by plaintiff it is not apparent how any railroad company could safely do business in the State. Its agents could never know when they were safe in any charge by them made. After a schedule of rates has been approved and published, the statute makes it unlawful for the carrier to charge less than the scheduled rate, under the pains and penalties prescribed in the act; and yet, under plaintiff's theory the common carrier might be liable for the penalty of triple damages because it did not charge a lesser rate."

In *Van Patten vs. Chicago, &c., Railway Co.*, 81 Fed. Rep., 545, the court held that a shipper could not maintain an action against a carrier for charging an unjust and unreasonable rate when the carrier had charged only the schedule rate published and filed in accordance with the Interstate Commerce Act, and said that if such an action could be maintained,

"It results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the questions which inhere in the establishment of a properly proportioned and equalized schedule of transportation rates? Take this case as an example. As already stated the petition contains 23 counts, each count being based upon shipments made from a different point and at each point the shipments were made at many different times within the limits from one to five years. Now the theory of the plaintiff is that the jury must inquire into and determine what the reasonable rate was for each shipment when made, and by comparing the reasonable rate thus fixed by the jury with that actually charged, determine whether the plaintiff is entitled to damages, and if so to ascertain the amount on each shipment made. It is self-apparent that no matter how intelligent the jury might be nor how conscientiously and carefully they might endeavor to deal with the prob-

lems thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances. But suppose the case involved but a single shipment, would the difficulty be remedied if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard already recognized and established is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges and the proper proportionate share which the particular shipment should bear."

The decision in *Smyth vs. Ames*, 169 U. S., 466, clearly shows the extremely complex character of the questions involved in the determination of such a subject.

In *Chicago, &c., Co. vs. Tompkins*, 176 U. S., 167, this Court said :

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable" (p. 172).

"We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth vs. Ames, supra*, a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him in-

duced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests." (p. 179.)

It is unreasonable to expect any jury to be qualified to deal with questions of such complexity and difficulty or to assume that the machinery of any criminal court is adapted to the trial of such issues.

No Decision in a Criminal Case Would be Conclusive or Authoritative.

Again, the entire inconclusiveness of a successful defense in such a criminal proceedings shows the utter inadequacy of any such proceeding as a judicial remedy. Each criminal proceeding would relate to a separate transaction, and would be tried by a separate jury. The jury in one case would not be bound by the evidence introduced in another case. Each jury might reach a different conclusion. Each jury might be influenced by some entirely different principle. There could be no finality if the validity of the statute is to be tested by such a remedy.

A judicial review by defense to a criminal prosecution would be virtually impossible except by the grace of the State authorities.

Moreover the right of the Company to have even this remedy would be hampered by this additional difficulty: If the company, to make a basis for a criminal prosecution as a means of testing the statute, should violate the statute in a few instances, and then, to avoid the risk of practically perpetual imprisonment for all its officers and agents, should comply with the statute as to all other transactions, the company's opportunity to have a judicial review would

depend upon the grace of the State authorities, for those authorities might readily refrain from prosecuting in the specific instances where the company, to obtain a judicial review, had permitted itself to become liable to prosecution, and might rest entirely content with the company's general compliance with the statute, especially if such course would deprive the company of any opportunity to assert in a court the invalidity of the statute.

SUCH A METHOD OF JUDICIAL REVIEW PRACTICALLY INVOLVES CONTINUOUS SUBMISSION TO A CONFISCATORY RATE.

But even if the State authorities should be willing to prosecute for the specific violations so as to afford the company an opportunity to present to the court its defense, the company, to avoid the risk of the overwhelming penalties, would be constrained to comply with the statute in all other cases pending judicial review. Thus it might come about that for several months or possibly several years, pending a final determination of the case, the company would be constrained, by the heavy penalties and the absence of any other method of judicial review, to charge a rate which by degrees would be confiscating the company's property. In other words, the scheme would be one whereby the company for a very substantial period would be subjected to confiscation. The Constitution, however, operates as a continuing protection to property, and it is as obnoxious to the constitution to confiscate the company's property for one year as it is to confiscate the company's property for ten years.

In *Smyth vs. Ames* it was urged that the reduction attempted by the State of Nebraska affected only a small part of the company's total earnings. In response to this argument the Court quoted with approval from the opinion of the Circuit Court as follows:

> "The fact that the State of Nebraska can reach only one twentieth of the total earnings, gives it no greater right to make a reduction in respect to that one twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earnings" (169 U. S., p. 43).

But even after such confiscation had been endured pending a judicial determination in the criminal proceeding, and even if the company should be finally successful in such criminal proceeding, the result would not be final in any sense. The company could not then with safety begin charging a rate in excess of the statutory rate, for another jury would not be bound by the decision of the jury in the case in which the question was tested. The facts might not be the same and indeed on account of the lapse of time would necessarily be different. As was pointed out in *Smyth vs. Ames*, the rates which were confiscatory at the time of the decision of the Circuit Court might readily, by virtue of a change in business conditions, become compensatory at a later date. Thus if the company be confined to a review in criminal proceedings only, it can never have a final or authoritative decision, and can never with safety exceed the statutory rate, no matter how confiscatory that rate may be.

If on account of these conditions the company should be driven to take the risk of disregarding the statutory rate as to all transactions, then it would be confronted with the danger of the absolute demoralization of its transportation service, including the United States mails and all interstate transportation of persons and property, by the fear on the part of its officers and agents of repeated prosecutions.

THE CONSTITUTIONAL RIGHTS OF THOSE INTERESTED IN THE RAILROAD PROPERTY CAN ONLY BE PROTECTED BY A SUIT IN EQUITY WHEREIN ALL PROCEEDINGS OF EVERY CHARACTER DESIGNED TO ENFORCE THE STATUTE COMPLAINED OF SHALL BE RESTRAINED.

The right upon the part of State authorities to execute an unconstitutional statute by the institution and conduct of criminal proceedings against the officers and agents of the railroad company would, of course, utterly nullify the jurisdiction of a Circuit Court of the United States sitting in equity and seeking to deal comprehensively with the whole subject-matter.

Likewise the right of individuals to resort to proceedings of any character to enforce their alleged rights under the statute claimed to be unconstitutional would so overwhelm the railroad company with actions as practically to nullify the effect of any action which the Circuit Court of the United States as a court of equity might see fit to take.

The consequence is that a court of equity cannot deal with this subject-matter unless it can prevent all proceedings, both civil and criminal, designed to enforce the statute complained of, and this is the theory upon which all of the rate cases have proceeded.

If it is necessary for the court to restrain actions of every other sort in order to provide an orderly and comprehensive determination of the single subject-matter involved, it is, of course, also necessary for the court to restrain any civil action no matter how comprehensive, which might be brought by any officers of the State; otherwise such action of itself would defeat the jurisdiction of the court and the court would be left simply in the attitude of an ancillary tribunal to the State court, preventing all other proceedings so as to clear the way for the main controversy and yet allowing the main controversy to proceed to determination in the State court, although the Federal court had first taken jurisdiction of the whole subject-matter.

WALKER D. HINES,
Of Counsel for Southern Railway Company.

Washington, D. C., December 2, 1907.

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SUPREME COURT OF THE UNITED STATES.

EX PARTE: In the Matter of EDWARD T. YOUNG, Petitioner.	No. 10 Original.

Brief on the Eleventh Amendment.

This brief is respectfully submitted by the undersigned as *amici curiae* at request of the Public Service Commission of the State of New York for the First District. That commission is charged under legislation of the present year with the duty, not only of regulating the railroads and lighting companies of the state as to maximum rates and many other matters, but also of enforcing other general and special laws of the state which impose duties upon those companies. The commission has thus become already a defendant in a suit brought in the Federal Court to enjoin the enforcement of an act of the New York legislature. It is also more probable than improbable that it will eventually be a defendant in other similar actions. It is therefore interested as much as the petitioner in the present case in the ruling to be made by this court upon the true construc-

tion of the Eleventh Amendment to the Constitution of the United States.

Its counsel do not concur with the petitioner, however, as to the precise distinction upon which the case should turn. They believe that the distinction suggested by him in his brief upon motion for leave to file his petition involves unnecessary concession. They believe that his argument has been unnecessarily restricted by decisions of lower courts, which thought themselves controlled as to the Eleventh Amendment by certain *obiter* remarks of this court that we believe to have given an impression contrary to what has been really decided.

The suggested distinction to which we allude is that between a suit against an officer specially charged by the state legislature with the duty of enforcing a particular statute, and an officer merely "charged with the enforcement of all the laws in general." The distinction as suggested by the Attorney General of Minnesota therefore amounts to this: that if the state legislature is so desirous of obtaining severe enforcement of a particular law that it charges a particular executive officer with the duty of enforcing it, and leaves him no discretion as to whether he should enforce it or not, a citizen has a right to sue that officer in the Federal Court to enjoin his carrying out the legislative will; but that if the legislature merely passes a statute, without restricting at all the discretion of the executive officers as to whether they shall or shall not enforce it, the citizen cannot sue in the Federal Courts; in short, that the bringing of an action or suit by the state does not represent action of the state, in such sense as to bring the Eleventh Amendment into operation, unless

it represents the independent exercise of judgment by the executive as well as by the legislature. This seems to us not only to be unfounded in reason, but to put the executive department of a state government unduly above the legislative department; and it seems to us that the true rule is, that if what the citizen complains of is merely the bringing of an action or suit against which he can plead unconstitutionality as a defense, his remedy is to wait until all the departments of the state government, the judicial as well as the executive and legislative departments, have decided against him, and then take a writ of error to this court.

We understand the Attorney General of Minnesota to be applying for a mandamus under the general authority of an Attorney General to apply for that remedy in case any law of the state that affects its citizens in general is being violated, and there is no other adequate relief. We understand him not to be specially charged with the duty of taking care in that manner of the enforcement of the particular maximum rate law which is complained of. It is therefore not necessary to his argument to draw an exact line between the case of an Attorney General acting under general powers and the case of an executive officer to whom is confided by statute "a plain legal duty, purely ministerial"; as for instance the case of an executive officer charged with the duty of enforcing a particular statute, but not left entirely without discretion as to the selection of a proper case for its enforcement.

The New York legislation may bring this question up in various ways. For instance, to illustrate from a suit now actually pending in the United States Circuit Court, and which may con-

ceivably reach this court during the present term, the Attorney General of the state, at the time when the suit was commenced, had as to proceedings in mandamus precisely the same function as that exercised by the petitioner here. There were also penalties imposed for violations of the statute in question; and it is the general duty both of the Attorney General and of the District Attorney for the county (the latter being a state and not a municipal officer) to sue for all penalties payable to the state, the remedy for their recovery being civil and not criminal. Pending the litigation, and during the present year, the Attorney General's powers in the matter of bringing mandamus proceedings were transferred by statute to the Public Service Commission. The counsel to that commission (one of the undersigned), acting under its direction, is vested in that particular case with whatever power and duty formerly pertained to the office of the Attorney General. The function of deciding primarily whether or not the corporation in question is violating a statute is confided to the commission for decision. If it decides that there is a violation, its duty to direct mandamus proceedings becomes a mandatory one. This applies both to violations by the corporation of a duty imposed by statute (as in the case now pending), and also to violations of lawful orders of the commission itself. As to penalties, some of them are suable by the commission through its counsel, while the duty of collecting others remains with the Attorney General and the District Attorney as before. It may be added that as to a part of the duties of the Attorney General of New York, he has for a generation past been not an entirely in-

dependent officer, but subject to the direction of the State Board of Railroad Commissioners; occupying indeed as to railroad matters a position almost identical with that now held by the counsel to the Public Service Commission.

We set forth this state of things because it seems well to illustrate the extreme difficulty of drawing any line of distinction similar to that attempted to be drawn by the Circuit Court cases which the present petitioner cites.

The Authorities.

We respectfully submit that this is a case where decisions of the lower courts should be altogether left out of consideration. Their opinions are but attempts to ascertain and apply with precision the previous rulings of this court. Principles of construction it early substituted a judicial construction were adopted for the Eleventh Amendment by this court at a comparatively early date; and these principles were not deducible from the language of that amendment. For a literal construction this court substituted a judicial construction based upon practical considerations. It disposed of the first case in which the question was raised, by saying that the amendment would not be applicable unless the state was a party to the record. Subsequently it overruled this proposition, recognizing that it nullified the amendment altogether, as if the officers of the state were enjoined the practical result was the same as if the state was enjoined itself. Thenceforward it has continued to hold that there were cases in which the officers of the state could be enjoined at suit of a citizen from doing what it would have been their duty to do had state laws been constitutional, and that on the other hand, there were cases in which

they could not be enjoined, even though the statutes which they were enforcing were unconstitutional. By a legal fiction, similar to that to which it finally settled down with respect to the citizenship of a corporation whose stock was held by citizens of different states, this court has held that in the former class of cases the suit *was not* against the state, while in the latter class of cases the suit *was* against the state.

As it seems to us that the point presented in this case, and the more or less nearly identical points which will soon come before this court in other cases, must be decided upon questions of principle and public policy, together with a careful analysis of the precedents in this court, we shall cite no decisions of the lower courts.

We append hereto, however, a chronological statement of the decisions of this court bearing upon the point. We begin with Pennoyer *v.* McConnaughy, because in that case the previous ones were summed up and classified. We have not attempted to quote liberally from the opinions, but instead we have attempted (with reference to the original records and briefs at difficult points) to state precisely what was the question before the court in each one of these cases, and what was the point upon which it really turned. Where two points were mentioned in the opinion as decisive, we have, as with respect to the Reagan case, called attention to later statements of this court, tending to show which was the one upon which it was really disposed of.

We trust that this tabulation will be convenient for purposes of reference, and hope that we have succeeded in avoiding mistakes.

History of the Eleventh Amendment.

The debates upon this amendment are not reported in the Annals of Congress. It is well known to have been the result of a very strong and unanimous feeling throughout the country that a state was entitled to the dignity conceded to other sovereignties to such a degree that it should not be allowed to be sued without its consent by any plaintiff of less dignity than itself. Of course a state can only be sued by serving papers upon one of its officers, and it can only be controlled by controlling the action of one or more of its officers. If it had been foreseen when the amendment was before Congress that suits might be brought for the purpose of controlling the action of a state by injunction against its executive department, there can be little doubt that the amendment would have been made more vigorous.

For a generation the question did not come up in the courts. Then it came up in a very hard case; and it has since been recognized by this court that, like many other hard cases, this one resulted in bad law; for while the decision in the case stands, the proposition laid down in it has long since been overruled. The United States employed a certain corporation as its agent for most important purposes. The State of Ohio undertook to tax that agent, although it was well settled that the power to tax was the power to destroy. In order that the unconstitutionality of this tax should never be established, and that the agent should have to pay it without recourse to the courts, the state provided a method for its collection which did not involve judicial proceedings. The taxing officer was directed to seize the

agent's property and apply it to the tax. If the agent could not sue the state officers in tort or for an injunction, there was no remedy. (See McMaster's History of the U. S., vol. iv, pp. 498-504.) Under these circumstances the suit actually brought was held not to be against the state, although it was a suit against the executive department of the state to prevent it from enforcing a law adopted by the state legislature.

It was not until long afterwards that the question first came before this court whether executive officers of a state could be enjoined from bringing a suit in the state courts, to which suit the alleged unconstitutionality of the state law could be pleaded by way of defense, and from the final judgment or decree in which suit a writ of error could be taken to this court. When the question did finally come up, the broad proposition as laid down in the original case was overruled, and it was held that the Eleventh Amendment was a bar to the remedy.

This again was supposed to be an established doctrine until the year 1894. In that year commenced a series of cases in which language was used by this court in its opinions that has given a general impression throughout the country that the original proposition has been re-established, and that a citizen who desires to contest the unconstitutionality of a state law has a choice of forum; that he can take advice as to whether the procedure in the State or that in the Federal courts is the more advantageous to himself, and then either sue in the latter or await suit in the former as his counsel may think more advantageous to him. No decision to this effect was actually made, however. In the Reagan case the legislature had

waived the state's immunity from suit; and in the two Nebraska cases the state's executive department through its Attorney General had made a similar waiver. In the Fitts and Cotting cases the bills as to the state officers were dismissed.

It was not until December 3, 1906, that this court ever actually sustained an injunction against the institution of judicial proceedings by a state officer, except after a waiver by the state. This was done in the case of the Mississippi Railroad Commission. The court did not allude to the Ayers case or to Fitts *v.* McGhee, but cited three cases in which the state had waived the point, and in which the *dicta* of the court were opposed to the two decisions last named, as shown in the Appendix hereto. Possibly a distinction is based upon the fact that it was an order of the commission, not an act of the legislature, whose enforcement was enjoined; or else the distinction is that the obnoxious order was a direct interference with and delay of interstate commerce, so that the commission may be regarded as having stepped altogether outside even of its colorable authority from the legislature. If so, the suit was not against the state, while jurisdiction was given by diversity of citizenship.

Distinctions Suggested.

We now take up for consideration the various distinctions that have been suggested for the purpose of separating the cases where the state can be sued through its officers from those in which it cannot be so sued. The foot note references, where not otherwise indicated, are to the paging of this brief.

The distinction between constitutional and unconstitutional statutes. We find occasionally remarks which, read literally, would indicate that, because a statute which is unconstitutional is void, hence executive officers are sued only as individuals when they are sued to enjoin their enforcement of such statutes. This distinction is untenable, because it would in effect overrule all of the cases in which the Eleventh Amendment has been sustained by this court in the past. They have all necessarily assumed for the purposes of argument that the statute in controversy was unconstitutional. The Eleventh Amendment would be no protection to the states if it bars only a suit which would be dismissed upon the merits. Nor could it ever apply to a suit based upon the Fourteenth Amendment. For if the state statute is constitutional, and the officer who is violating the citizen's constitutional rights is acting upon an erroneous construction of the statute, or is violating it, no case arises under the Fourteenth Amendment at all.[1]

The distinction between acts of officers specially charged with the duty of enforcing a particular statute, and officers generally charged with the duty of enforcing the laws. We have already commented to some extent on this suggested distinction, and pointed out that the case of an officer specially charged with the general enforcement of a particular statute, but not restricted to a strictly ministerial function in the matter, seems not to have been fully considered.[2] The present petitioner is clearly within the class protected by this distinction, and therefore properly presses it be-

[1] Barney *v.* City of New York, 193 U. S., 430.
[2] pp. 2-5.

fore this court. Whether or not the line attempted to be drawn would protect from suit the executive officials of the State of New York is not entirely clear.

While this supposed distinction is based upon language used by this Court, it is not sustained by the actual decisions of the court, which are to the contrary. Thus Ayers was an officer specially charged by a mandatory statute with the enforcement of the Virginia coupon law.[3] Nevertheless, a suit against him was held to be a suit against the state. The Nebraska officers on the other hand (if the Nebraska cases are to be given any weight in this connection) had only the most general authority.[4]

The origin of this suggested distinction seems to have been the familiar doctrine that when there is any discretion vested in an executive officer, it will not be controlled either by mandamus or injunction. We respectfully submit that this doctrine has no proper relation to the Eleventh Amendment. When the Attorney General's general power to apply for a mandamus has been transferred, as in New York, to the counsel for a particular commission, so far as it relates to a particular class of statutes, does such transference amount to a waiver of the Eleventh Amendment? If the unconstitutional statute leaves the matter of its enforcement to the discretion of the executive officer, how does the fact that he has such a discretion protect a state from suit, if he so exercises it as to put the citizen to the expense of defending a suit in court, in order to protect his rights? If on the other hand, as in the Ayers case, the executive officer's duty to enforce the statute

[3] p. 39.
[4] p. 32.

has been made mandatory by the state legislature, how is its enforcement any the less an act of the state? In the former of these two contingencies the statute is being enforced because, in the exercise of a discretion vested in him by the legislature, the executive officer thinks that it is one of the cases in which the legislature intended him to take affirmative action. In the latter contingency the statute is being enforced because the legislature, in the exercise of its discretion, thought its enforcement so important that no option should be left with the executive department in the matter. In the former contingency each department of the state has exercised discretion, but that of the executive department was really only in the ascertainment of what the legislative department intended. If there is any distinction between the legislative and executive departments, as to which of the two more directly and eminently represents the state, we respectfully submit that it is the legislative department which has always been supposed to be in the higher position of the two; so that if the legislative department, in enacting a statute, makes its rigid enforcement mandatory, the enforcement of that statute is preëminently the act of the state itself. If, however, the exercise of the discretion of one department alone is not to be considered as sufficiently representing the state, then we submit that we should logically go further and say that a consensus of all three departments of the state government should be required before it can be said that the state is doing something to violate the Fourteenth Amendment. In other words, it should not be until the legislative act has been brought by the executive department before the judicial department, and the

judicial department has sustained it, that the Federal courts can be appealed to. In other words, the remedy is by writ of error to this court, and not by suit against the executive officer.

Our views as to this distinction are shared by the writers of the article on this subject in 15 Harvard Law Review, 368-373, although, in discussing certain cases, they seem not to have been aware of all the facts stated in the Appendix hereto; and in discussing the Tompkins case they were unaware of the point that the Eleventh Amendment is waived if not availed of by the state. It is also noticeable that the writers of that article are in favor of a broad jurisdiction in the lower Federal courts, and opposed to limiting jurisdiction so that litigations of this nature should only come up through the State courts.

The distinction between cases in which the state has a pecuniary interest and cases in which it has no pecuniary interest. This distinction is stated as the first ground of decision in the Reagan case,[5] although that case has since been placed upon the other ground stated.[6] We respectfully submit that for the reasons hereinafter stated it is not a tenable distinction.[7] Indeed, were the distinction made the other way, and were it argued that the state's position, when its own pecuniary interests are the matter at stake, should be assimilated to that of a private citizen, the argument might be stronger.[8] No court has maintained more

[5] p. 28.
[6] p. 28.
[7] pp. 26, 28-9.
[8] French Republic *v.* Saratoga Vichy Co., 191 U. S., 427, 438.

strongly than this court the doctrine that a state, as *parens patriae*, is interested in whatever is of general interest to its citizens.[9] In the Fitts case, where the Eleventh Amendment was enforced, the state had no special or pecuniary interest, and in the Cotting case its interest was only in the possible fine in case of conviction.[10]

The distinction between suits and proceedings in civil courts, and criminal prosecutions for penalties. This is only of importance because an attempt has been made to distinguish the Fitts case by calling everything in the opinion *obiter* except that part which considers the jurisdiction of equity to enjoin prosecutions for penalties, and thus to base it upon a proposition which does not involve the Eleventh Amendment. This is impossible without partially overruling the decision, since it was only the appellant Carmichael who was concerned in the criminal prosecutions, and the mandate required the dismissal of the case also as against Fitts, whose function it was to proceed in mandamus or for a forfeiture of the complainant's charter rights.[11] So far as the mandamus is concerned the position of Fitts is precisely the same as that of the present petitioner.

The supposed distinction between criminal prosecutions for penalties and civil actions to recover penalties seems to have been since overruled, and it is now held that the method of procedure is immaterial, and that either form of proceeding will be enjoined in a proper case if there is no other

[9] *In re* Debs, 158 U. S., 564; Missouri *v.* Illinois, 180 U. S., 208; Kansas *v.* Colorado, 185 U. S., 125.
[10] pp. 34, 38, 41.
[11] pp. 34-6.

relief available.[12] A criminal prosecution, when the sentence is only the infliction of a pecuniary penalty, differs from an action for damages only in procedure, some states adopting one way and some the other; nor is the institution of either form of proceeding for a penalty any more or less the act of the state than a proceeding for direct relief by way of mandamus; as was in fact decided by this court in treating Fitts and Carmichael alike in the case referred to.

The distinction between direct injuries by state officers and the institution of judicial proceedings. This is a distinction which, as has already been pointed out, was never shaken until 1894. The reason for it is that, as a state can refuse to be sued through its officers in its own courts, to apply the Eleventh Amendment here would be to cut off all opportunity of reaching this court, and to cut off all remedy. It cannot be overruled without overruling the Ayers case, which has often been approved and was followed in Fitts *v.* McGhee. We respectfully refer to the reasoning of the Ayers opinion as most cogent and convincing; and have already shown that that case cannot be distinguished on the ground that the state was not pecuniarily interested, or on the ground that the petitioner was not under a mandatory duty. No act can be more distinctively the act of the state than the commencement of a suit in its name, or in the name of the officer representing it, by the Attorney General or some other officer or board to whom a portion of the ordinary functions of an Attorney General have been transferred. The practical result of the

[12] pp. 43-4, 44-5.

Eleventh Amendment in its relation to other litigations, as we understand its scope, is merely to cause controversies to reach this court by writ of error from the highest court of the state after a trial according to the state procedure, instead of by appeal from a decree of a local federal judge, generally entered upon the report of a Master in Chancery.

The distinction between enjoining the enforcement of a statute, and enjoining the enforcement of the order of a state commission. This is the distinction suggested in the Gill case.[13] It is not the commencement by the Attorney General of a judicial action or proceeding that is the real subject of the injunction according to this theory, but the maintenance by legislative authority of an unconstitutional claim, which at least puts the citizen to the expense of litigation to defend his rights, even though his eventual success is assured. If, as in the case of a statute directly imposing a maximum rate, the act complained of is that of the legislature itself, no suit is maintainable to enjoin it, since the legislature cannot be made defendant; and indeed the legislature is generally *functus officio* by the time the suit is begun. If however the act complained of is that of a railroad commission or similar body, acting under general authority given in a constitutional statute, the order of the commission may be treated according to this theory as a continuing act, enjoinable by suit against the members of the commission, which is a continuing body. The validity of the distinction is not involved upon the applica-

[13] pp. 29-30.

tion of the present petitioner, except as it may bear upon the claim that earlier cases have been overruled by that of the Mississippi Railroad Commission. It cannot be maintained on the theory that the act of the legislative commission is not the act of the state.[14] The Mississippi case we have elsewhere discussed.[15]

The distinction between suits by the Attorney General and suits by a legislative commission. It has been argued elsewhere that the Attorney General indeed is an officer of high dignity, and so far identified with the state that the doctrine of the Ayers and Fitts cases cannot be avoided, and that to enjoin him from prosecuting an action is equivalent to enjoining the state itself; but that on the other hand a mere legislative commission is of no higher standing than a municipality or other state agency. It is difficult to appreciate, however, wherein the state subjects itself to suit when it takes away from the Attorney General some of the duties naturally inherent in his office, and confers them upon another officer or officers, bearing another name. Thus in New York, as we have pointed out, the Attorney General has long acted under direction of a legislative commission in some matters, while other functions that still belonged to him by the inherent nature of his office have subsequently been transferred to the counsel for another legislative commission, acting under direction of that commission. That counsel has in railroad matters precisely the same functions that formerly belonged to the Attorney

[14]Barney *v.* City of New York, 193 U. S., 430, 440-1.
[15]p. 9.

General, and he is subject to precisely the same amount and character of direction and no more. It is for the legislative department of a state to distribute executive functions among the various executive officers, and to provide the official names by which those officers shall sue and be sued. It is respectfully submitted therefore that there is no tenable distinction under the Eleventh Amendment, based on the official title of the officer against whom the bill is filed. This distinction, like the one last considered, is only relevant to the present proceeding in so far as it is important for the purposes of the present proceeding to view the entire ground, and in particular to consider the Mississippi case.

Arguments from Public Policy.

So far as the questions herein discussed shall be regarded by the court as open for decision, the decision will necessarily be based largely upon grounds of public policy. The whole judicial construction of the Eleventh Amendment has been based upon considerations of public policy, and not upon the language of the amendment itself.

Under the construction of recent opinions of this court which now prevails among the circuit and district judges, an immense litigation is invading the lower Federal courts, and by means of their injunctions they are controlling on a large scale and in numerous instances purely local matters. The original controversy out of which this *habeas corpus* proceeding arose had some bearing upon matters of Federal cognizance; for if local rates are lowered, interstate rates may indirectly be held up which otherwise would be vol-

untarily lowered. But the prevailing construction of the amendment in the lower courts not only enables but requires them to issue injunctions against the enforcement of all state laws regarding the rates of fare or other details of management of local trolley lines or gas companies or electric light companies or water companies, whenever a *prima facie* case is made by affidavit. The decision of a controversy which is purely local on the one hand, and peculiarly close to the life of the people of the locality on the other hand, is thus transferred from the courts with which they are familiar to courts that are almost foreign in their traditions and procedure.

Thus in New York it has been for more than sixty years past a constitutional right of the defendant in an equity suit to have the suit tried in open court, and to have it decided by a judge who has actually seen the witnesses. But corporations complaining of maximum rates or similar regulations prefer to bring their suits in Federal courts, and by means of preliminary injunctions to force a trial where all the evidence is taken before a Master, who has not even the power to exclude any testimony from the record, and whose record in a case of this sort is always made up of competent and incompetent, relevant and irrelevant testimony mixed up in what to the defendant's counsel appears inextricable confusion, while in case of an adverse decision by the Master the defendants find themselves faced with an unknown procedure as to objections to the draft report, exceptions, etc. The state is at much more of a disadvantage than is an ordinary litigant whose interests are so important, since appropriations for hiring special counsel are usually

small, and the state must rely upon the work of its regular salaried assistants, whose acquaintance with Federal procedure is usually but small. To the people, the whole litigation *in camera* seems to have something strangely secret about it, the Master's findings do not carry judicial weight although generally affirmed without thorough re-examination, and the final decision of this court does not give to them the same feeling of conclusiveness and authority as a decision made after a litigation in the open, in the methods guaranteed by their local constitutions and forms of practice. This is because it is not felt to be based upon as satisfactory a trial upon the facts in the court below.

The narrowing of the Eleventh Amendment and consequent assumption of an extended authority by the Federal courts also creates an unavoidable, and as it seems to us an entirely justifiable dissatisfaction, because it means that for long periods of time high rates are often maintained by the fiat of a single judge. The state procedures may provide for an immediate appeal from a decision continuing an interlocutory injunction; an appeal to the court which will finally dispose of the litigation. A constitutional case in a Federal court, during the taking of testimony before the Master and subsequent proceedings incident to his decision and report, seems to the public to be equivalent to an administration of an unpopular law by a single Federal official. It is respectfully submitted that there is some excuse for this feeling, and that the jurisdiction should not be extended beyond where it has already gone.

It is indeed true that such considerations should not affect the decision, even when as in this case

the question is one mainly of public policy, if there is otherwise strong reason for extending the jurisdiction; but we submit that there is no reason for taking that course; that here on the contrary, as in the analogous case of the license and other regulation of local corporations by the legislature and executive, the states are as well equipped to deal with the matter as the United States; that they can properly be trusted to try the facts and prepare the record for this court, and to decide upon the matter of preliminary injunction; that if the responsibility is cast upon them, they can be relied upon to be as fair and as wise as the Federal judges of first instance; and that by this means the lower Federal courts will be relieved from litigation which now much interferes with the performance of their other duties.

There is a very general feeling, that has recently found expression not only among the outside public, but also from high officers of the legislative and judicial departments of the United States, that the interference of the Federal government in matters of purely local concern, and in matters which formerly were left to the states, has gone too far. It is respectfully submitted that this criticism applies to judicial as well as to legislative practice; that the judicial practice is based upon *dicta* rather than upon decisions of this court; and that it is still open to this court to remedy to a very considerable extent the resultant conditions by carrying the doctrine of the Ayers case and Fitts *v.* McGhee to its logical conclusion, and putting an end to the practice of suing officers of a state for the sole purpose of preventing them from

bringing suits as against which there is full remedy by way of defense in the state court, and of writ of error here in case of adverse decision there.

December 2, 1907.

Respectfully submitted,
EDWARD B. WHITNEY,
ABEL E. BLACKMAR,
as *amici curiae*.

Appendix.

Recent Cases bearing on Eleventh Amendment.

Pennoyer v. *McConnaughy*, 140 U. S., 1, 10 (April 20, 1891, Lamar J.), was a suit against the Oregon Board of Land Commissioners, to enjoin them from clouding the title to land by selling and conveying it. It contains a classification of the preceding decisions by Lamar, J., who shows that Osborn *v.* Bank of United States (9 Wheat., 738), so far as it holds that "the Eleventh Amendment is limited to those suits in which the State is a party to the record" is no longer recognized. He classifies previous cases against state officers into, *first*, those where they are sued "as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts"; and *second*, where they "under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state"; specifying in the second class suits to recover money or property unlawfully taken, or for compensation in damages, or for an injunction where the remedy at law is inadequate, or for a mandamus to enforce "a plain legal duty purely ministerial" (p. 10). He does not specifically discuss the case of a suit to restrain legal proceedings by a state officer in the courts of the state, to which proceedings the constitutional objection could be pleaded as a defense.

The cases cited as belonging to the first class are as follows *In re Ayers*, 123 U. S. 443 (see *infra*, pp. 38-9), where the Attorney General of Virginia was restrained by the Circuit Court from com-

mencing suit to put the Virginia coupon law into effect; but, having been committed for contempt for violating the injunction, was released upon habeas corpus. In this case the previous decisions were reviewed at considerable length by Matthews, J., who pointed out (p. 497) that, since the suit which the Attorney General was intending to bring was one to recover taxes from persons who claimed to have paid them by tender of certain coupons, the suits would be "by the State of Virginia in its own name and for its own use," and that in no other way than by such an injunction could the state be enjoined against bringing actions in its name. *Louisiana* v. *Jumel*, 107 U. S., 711, under which title are reported a suit for an injunction against the State Board of Liquidation and also a petition for mandamus against the State Auditor and Treasurer and said board, in an attempt to enforce certain claims against the state treasury (compare cases cited in the Belknap case, *infra*, p. 30). *Antoni* v. *Greenhow*, 107 U. S., 769, in which four of the court held that a mandamus against the Treasurer of the city of Richmond, who, as such, was charged with the collection of state taxes, to compel him to accept a coupon in payment of taxes, would be a suit against the state. The amount involved was $3.15 (p. 774). *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S., 446, where a foreclosure suit under a second mortgage against a railroad which had been purchased by the State of Georgia under a first mortgage, making the Governor and Treasurer parties defendant, was held untenable (compare Smith *v.* Weguelin, L. R., 8 Eq., 198; Larivière *v.* Morgan, *Id.* 7 Ch. App., 550; 7 E. & I. App., 423). *Hagood* v. *Southern*, 117 U. S., 52, which was nominally a suit against the Treasurer and other officers of South Carolina, but really a

bill to compel the redemption by the state of some of its scrip (compare Hans *v.* Louisiana, 134 U. S., 1).

The cases cited by Lamar, J., as in the other class are as follows: *Osborn* v. *Bank of United States*, 9 Wheat., 738, which was a bill against the State Auditor of Ohio to restrain him from collecting a tax out of the complainant, which was a government agency, by entering its rooms, opening its chests, etc. No judicial proceedings were necessary under the state statute. As a state canot be sued in its own courts except by its consent, there was here no other remedy (see pp. 847-9). *Davis* v. *Gray*, 16 Wall., 203, which was a suit against the Governor and Land Commissioner of Texas to restrain them from clouding the title of the company of which complainant was the receiver, by granting to other persons lands which the state had declared forfeited. *Tomlinson* v. *Branch*, 15 Wall., 460, where certain stockholders of a railroad sued the State Auditor of South Carolina and others, together with the company, to enjoin the company from paying and the others from collecting (how, it does not appear,) certain taxes. *Litchfield* v. *Webster County*, 101 U. S., 773, where a land-owner sued the Treasurer of the State of Iowa to enjoin the collection of certain taxes upon his land, with penalties for non-payment of taxes, the Treasurer being authorized to offer the lands for sale. No question seems to have been raised under the Eleventh Amendment in this or the last named case. *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S., 311, which was a bill against the Auditor and other officers of Virginia to enjoin them from distraining the complainant's rolling stock after a tender of tax-receivable coupons. *Poindexter* v. *Greenhow*, 114 U. S., 270, which was an

action of detinue against the Treasurer of the city of Richmond, who was as such charged with the collection of taxes due to the State of Virginia, and who had distrained property after due tender of such coupons. The tax involved was $12.40. *Board of Liquidation* v. *McComb*, 92 U. S., 531, which was an injunction against the Board of Liquidation of Louisiana to restrain it from issuing certain bonds for the liquidation of a certain debt due by the state; the complainant being the holders of others of the same series, whose bonds would be greatly depreciated in value by such further issuance.

Note.—It will be perceived that the pecuniary interest of the state in the controversy has no relation to the distinction between these two classes of cases. They were mostly tax cases, *and in all of them the state was itself interested.* The distinction apparently was that in the former class of cases the defendant was not, and in the latter case he was, by his own direct action and without submitting the matter to a court from whose decision an appeal would lie, about to harm the complainant by taking his property, or clouding his title to it, or otherwise reducing its value.

In re Tyler, 149 U. S., 164, was a *habeas corpus* brought to test the jurisdiction of the court under a bill in equity against the treasurers and sheriffs of eighteen counties of South Carolina, to restrain them from issuing "tax executions" and levying and seizing thereunder property of a railroad for taxes. This belonged clearly to the second of the two classes of cases above mentioned.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362 (May 26, 1894; Brewer, J.) This seems to be the first case where the state's pecuniary interest was the collection of pecuniary penalties imposed for offences against its laws; the laws being enacted for the benefit of its citizens as distinguished from that of the state itself. The plaintiffs in error here were the members of the Texas State Railroad Commission and Attorney General (now Senator) Culberson. The suit questioned the constitutionality of the law establishing the commission; but to this extent the decision was adverse to the complainant. It questioned also the propriety of the rates prescribed by that commission; and to this extent the suit was sustained and decree for complainant affirmed.

The commission's power in the matter of enforcement of the law was "to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs, * * * and to enforce the same by having the penalties inflicted as in the act prescribed through proper courts having jurisdiction" (p. 362). The bill "prayed a decree restraining the commission from enforcing those rates" (p. 367), and the decree restrained it "from instituting or authorizing or directing any suit or suits, action or actions against the defendant railroad company for the recovery of any penalties," and "from certifying any copy or copies of any of said orders, tariffs or circulars," or from delivering the same "to the said Culberson or any other party, and from furnishing the said Culberson, or any other party, any information of any character" for the purpose of aiding any penalty suit (p. 369).

The act established certain penalties recoverable by the state, as well as those recoverable by

individuals; and the Attorney General was charged with the duty of suing to recover the same. The bill prayed an injunction restraining him from instituting any such suits, and the decree restrained him accordingly (pp. 366-7, 369).

The statute provided as a means for reviewing the rates established by the commission a petition to be filed "in a court of competent jurisdiction *in* Travis County, Texas, against said commission as defendant" (p. 365).

Attorney General Culberson set up the Eleventh Amendment, discussing it separately on behalf of himself and on behalf of the commission (pp. 371-8).

The court's opinion based jurisdiction upon two different grounds:

First, upon the ground that the state "has in a pecuniary sense no interest at all" except "when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property," and "is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes," as is frequently granted (p. 390).

Second, that "express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit"; namely, the suit *in* Travis County, in which county the United States Circuit Court sits; for it cannot be doubted that a state, like any other government, can waive exemption from suit (pp. 391-2).

Note.—The decision is cited in Barney *v.* City of New York, 193 U. S., 430, 440, as standing on the second of these grounds.

The first ground seems inconsistent with some of the previous tax cases, even if there is any tenable dis-

tinction between the pecuniary interest of the state in the collection of taxes, and its pecuniary interest in the collection of penalties; the penalties here being at least as great as the taxes considered in the previous cases. The distinction between the two classes of tax cases reviewed in Pennoyer *v.* McConnaughy does not turn upon the pecuniary interest of the state, since the state was conceded to have a pecuniary interest in all of them, but upon the question whether the state was or was not *directly* taking or injuring the complainant's property, or threatening to do so. There had been no precedent for a decree restraining officers of a state from bringing a suit in which the constitutional question could be raised as a defense; or from asking another officer to do so; or from furnishing him with evidence for use in such a suit.

No notice was taken by the court of the separate request of Attorney General Culberson for a dismissal of the suit as against himself, and there is no indication that the court considered his position to be in any wise different from that of the commission.

St. Louis and San Francisco Ry. Co. v. *Gill*, 156 U. S., 649 (March 4, 1895. Shiras, J). In this case, referring to certain *obiter* suggestions of Miller, J., in the Minnesota case (134 U. S., at pp. 460-1) as to remedy, the court say (p. 666): "But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious reme-

dy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defence to an action for the collection of the penalties."

Belknap v. *Schild,* 161 U. S., 10, 18, discussed this line of cases through Gray, J. This was a suit against certain officers of the United States navy to restrain them from infringing a patent for caisson gates. While dismissing the bill for lack of equity, it was held that the defendants were suable upon the ground that officers are not protected from their torts in time of peace. Gray, J., draws the distinction between the line of cases commencing with Osborn *v.* Bank of United States, where officers of a state are restrained "from doing *positive acts,* for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion," and the line of cases beginning with Louisiana *v.* Jumel, of injunctions "to restrain or control the use of property held in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party." In the latter line of authority he cites also North Carolina *v.* Temple, 134 U. S., 22, where a bill praying that the state auditor be required to levy a special tax was held a suit against the state, and McGahey *v.* Virginia, 135 U. S., 662, 664, to the same general effect.

Scott v. *Donald,* 165 U. S., 107. This was a bill against certain constables of the State of South

Carolina alleging that in compliance with the South Carolina dispensary law they had seized and carried away liquors belonging to the plaintiff and were continuing to do so, and thereby involving the plaintiff in a multiplicity of suits.

Scott v. *Donald,* 165 U. S., 58, was an action for damages against the same constables for carrying away plaintiff's liquors.

> *Note.* These cases, and the one next following, fall directly within the principle of Poindexter *v.* Greenhow, as expounded in Pennoyer *v.* McConnaughy, *supra.*

Tindal v. *Wesley,* 167 U. S., 204, was a suit against the Secretary of State of South Carolina and a watchman employed by him, for the recovery of certain real property in that state. They averred that they were merely holding it as custodians, and that the title and right of possession was in the state. The jurisdiction was sustained.

Smyth v. *Ames,* 169 U. S., 466 (March 7, 1898. Harlan, J.). The Eleventh Amendment was pleaded in the answers of the Nebraska state officers; but in the courts this seems to have been treated by them purely as a moot case, apparently conducted by agreement of both parties in order to get a ruling upon the questions involved. It was a stockholders' suit. The state officers joined as defendants were the Attorney General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings, who by reason of their offices constituted the State Board of Transportation; together with the three secretaries of that board. The bill prayed that the board be enjoined from entertaining complaints against the company under the act, and from instituting or prosecuting any action

or proceeding, civil or criminal, &c.; and that the Attorney General be enjoined from bringing any proceeding by way of injunction, mandamus, civil action or indictment. We do not find that it alleged any specific wrong or trespass to be threatened. The appeals to this court were prosecuted by the members of the board as such. There was no separate answer or appeal by the Attorney General.

Two features of the case are to be remarked: first, that the rates in question were fixed by the statute (the power to further reduce them having not been exercised); and second, that the official defendants were not specially charged by the maximum rate law with its enforcement. Under the prior act by which the board was constituted it had general power to investigate whether there was any violation of "any law cognizable by said board by any common carrier," and if so to notify the carrier to desist and make reparation; but beyond that it seems to have had no power in the premises, unless the violation was of one of its own orders. There were two remedies provided by the maximum rate law: first, a suit for damages and counsel fees to be brought by the person overcharged; and second, a criminal prosecution, the sentence being in the form of a heavy fine (pp. 475-6). By what officer this prosecution was to be conducted was not specially provided in this statute. By the general laws the duty fell primarily upon the county attorney, but the Attorney General could direct them, and might be specially requested by any officer of the executive department to take charge of the prosecution. Under his general powers he had also authority to apply for a mandamus, but was not subject to the direction of the board (see 22 Neb., 313).

The Circuit Court restrained the board from determining any complaints against the railroads

for violations of the act, "and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal" for such violations; and restrained the Attorney General from bringing "any proceeding by way of injunction, mandamus, civil action or indictment." (pp. 476-7).

The board was also restrained "particularly from reducing *its* present rates charges for transportation of freight to those prescribed in said act" (p. 477). It would seem to be the fact that the board had not fixed rates prior to the act (see pp. 547-9). However this may be, the act fixed the present rate of charges, and the board had no function in the matter.

While the Eleventh Amendment had been pleaded, "it was not discussed at the bar by the representatives of the state board" (p. 518), and, on cursory inspection of the briefs that are in the Bar Association in New York, we are unable to find that any such question was raised therein or indeed any jurisdictional or technical question whatever. Mr. William J. Bryan, for appellants, filed a statement of their contentions which raises no such question. Nor does this seem to have been one of the jurisdictional points raised in the court below (64 Fed. Rep., at p. 172).

Fitts v. *McGhee*, 172 U. S., 516 (January 3, 1899, Harlan, J.). To understand this decision it is necessary to notice carefully the various steps taken in the case below, and the reasons for which the various parties defendant were joined as such. The final decree in the case, after the declaratory clause as to the unconstitutionality of the rates in question, was simply that "the injunctions heretofore granted in the cause are hereby made perpetual" (p. 523). This requires an examination of the various preliminary injunctions.

The Alabama statute of February 9, 1895, prescribed maximum rates of toll to be charged upon a certain bridge. As a remedy for overcharge it provided a penalty of twenty dollars for each offence, to be recoverable before a justice of the peace. It did not expressly state at whose action this penalty "should be recoverable," but the penalty was to go to the person overcharged (p. 516). There was also a general provision of the Criminal Code of Alabama providing that for overcharges on toll bridges there might be a criminal prosecution, and a fine upon conviction of not more than one hundred dollars (p. 520). It may be doubted whether this provision was applicable, in view of the fact that the statute in question was a special one, and provided specially the penalty for its own violation. It seems to have been assumed, however, that the criminal prosecution was a concurrent remedy.

The original parties defendant were the State of Alabama (as to which the suit was subsequently dismissed by amendment of the bill of complaint), Governor Oates and Attorney General Fitts, and they were required to answer the bill "in behalf of the state" (p. 517); and a temporary injunction was issued restraining Oates and Fitts "from instituting or prosecuting any proceedings" under the forfeiture clause in the act of February 9 (p. 518); but clearly the party plaintiff under that clause was the person overcharged, to whom the penalty was to go, and this court recognizes that the Attorney General had no duty in connection therewith (p. 529). Defendants having moved for dismissal of the bill under the Eleventh Amendment, it was amended by inserting allegations that persons who had been overcharged "had threatened to institute suit or suits against the plaintiffs under the penalty clause of

the act, and had also threatened to procure proceedings to be instituted in the courts by the Governor and Attorney General in the name of the state, by a *mandamus or otherwise* to compel the plaintiffs to pass people over the bridge at the rates fixed by the act"; and for a forfeiture of the bridge franchise; "and that the persons so protesting and threatening suits were too numerous to be made parties to that suit," naming a certain Gilliam as one of them (pp. 518-19). The bill was now amended in accordance with these allegations, and Gilliam joined as a party defendant; and a new injunction was issued *restraining Fitts as Attorney General* and Gilliam and all persons whomsoever *from proceeding by mandamus or otherwise to compel obedience to the act,* and from in stituting proceedings for the forfeiture of the franchise (p. 519).

Later on one Carmichael, the solicitor of the judicial circuit in which the bridge was situated, obtained about a hundred indictments for violation of the general provision above referred to (pp. 520-1). It does not appear that the Attorney General had anything to do with these indictments, or had any duties in connection with the enforcement of this criminal statute. The bill was thereupon again amended, joining Carmichael as a party defendant, and an injunction was sought against "the said defendants and said Carmichael," restraining the prosecution of these indictments; *but the court issued the injunction against Carmichael alone,* restraining him "from instituting or prosecuting as such solicitor any indictments," etc. (pp. 521-2).

The various defendants demurred, and final decree was entered in terms above set forth; the suit having first been discontinued as to Oates, who had ceased to be governor of the state (p. 523).

The mandate (disregarding a clause immaterial here) is as follows (p. 533): "*The judgment of the Circuit Court is reversed, with directions to dissolve the injunction restraining the institution or prosecution of indictments or other criminal proceedings in the state court, to dismiss the suit brought by the receivers against the Attorney General of Alabama and the Solicitor of the Eleventh Judicial Circuit of the State*" [&c.]. No reference is made to any of the injunctions except that which was against Carmichael alone. No reference is made to Gilliam. We understand that no motion was ever made to amend the mandate.

The court consider the case as coming within the principle announced in *In re* Ayers, *supra,* and quote at length the discussion in that case of attempted restraints upon "the bringing of suits by the State of Virginia in its own name and for its own use" through its law officers, and distinguishing such restraints from those "which consisted of the unlawful seizure and detention of [complainants'] property" where the defendants "were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value" (pp. 525-8). Applying the principles of the Ayers case, the court say that an order restraining the state's officers from taking judicial proceedings to execute its statute is an order "which restrains the state itself" (p. 529).

Distinguishing the series of cases from Poindexter *v.* Greenhow to Smyth *v.* Ames, the Court say (p. 529): "Upon examination it will be found that the defendants in each of those cases were officers of the State, *specially charged* with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about

to commit *some specific wrong or trespass* to the injury of the plaintiff's rights."

The court again reiterate the distinction between a suit to restrain officers "from committing by some positive act a wrong or trespass" and one with relation to a statute "in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state"; and point out that here neither of the officers named "held any *special relation* to the particular statute", but had only the general duty of seeing that the statutes of the state were enforced; whereas the citizen, if sued, "can make his defense upon the ground that the statute is unconstitutional and void" (p. 530). Then, however, the court goes on to say "What has been said has reference to that part of the final decree which holds the act of February 9, 1895, to be invalid and inoperative" (p. 530).

This disposed, therefore, of the whole decree except the clause providing that "the injunctions heretofore granted in the cause are hereby made perpetual"; and the first of these injunctions had already been in effect disposed of by holding that the Attorney General had no functions with relation to the penalty contained in the act of February 9. Two injunctions remained to be considered; first, that enjoining the Attorney General and Gilliam from instituting proceedings in mandamus or for a forfeiture of the bridge franchise; and second, the injunction against Carmichael to restrain the criminal proceedings. The court, however, either overlooked the former of these two injunctions or else regarded it as covered by the discussion already made, saying (p. 531): "It remains only to consider the case so far as the final decree assumes to enjoin the officers of the State from instituting or prosecuting any indictment or

criminal proceedings having for their object the enforcement of the statute of 1895."

The rest of the opinion is taken up with the discussion of the jurisdiction of equity in criminal matters, and holds that it has no jurisdiction to enjoin them.

NOTE.—The dismissal of the suit as against the Attorney General of Alabama is a decision that the law officer of a state cannot be enjoined by a federal court from prosecuting in the courts of that state a judicial proceeding. The particular proceedings which the Attorney General might have brought, and the bringing of which was enjoined, were mandamus and a suit for forfeiture of a corporate franchise. As this court's mandate dismissed the bill as to him altogether, it necessarily disapproved the injunction against his instituting those proceedings.

In ruling that the case comes within the principle announced in *In re* Ayers, the court reaffirm the doctrine that the question whether or not a statute against state officers is a violation of the Eleventh Amendment does not depend upon the question whether or not the state has a strictly pecuniary interest; for Alabama had no pecuniary interest in the proposed mandamus proceeding, or the proposed suit for the forfeiture of the corporate franchise.

The point of similarity between the Ayers case and the Fitts case is that both were attempts to restrain the state officers from bringing suits. If the Ayers case is a precedent (and over one-third of the opinion of the court is taken up in explaining and quoting it), then

the point now decided is that legal proceedings on behalf of the state by its officers cannot be enjoined in a federal court; at least when the proceedings are instituted in pursuance of a general duty to enforce the laws, as distinguished from a duty, specially imposed, to enforce a particular law.

The remarks quoted from pp. 529-30 of the opinion do not seem to be sustained by the records in the Reagan and Smyth cases. On the other hand, the Attorney General in *In re* Ayers seems to have been "specially charged" with the enforcement of the statute complained of, and held a "special relation" to it (Virginia Acts of May 12, 1887, §§ 12, 13, and March 12, 1878, c. 183, §2. Ayers record, pp. 41-2, 48).

Some doubt has been cast upon the last point made in the court's opinion by the Davis & Farnum and Dobbins cases, *infra,* when there is another remedy available.

Smith v. *Reeves,* 178 U. S., 436 (May 14, 1900, Harlan, J.). The California code permits a taxpayer to pay in his taxes and bring suit to recover them, if dissatisfied with the assessment, within a certain period, the suit to be brought against the State Treasurer. The Treasurer may demand that the action be tried in the Superior Court of the County of Sacramento. If the final judgment be in favor of the plaintiff, the state pays it (pp. 437-8). An action of this nature was brought by the receivers of a corporation created, under an Act of Congress; but it was brought in the United States Circuit Court. The relief sought was a judgment for a sum of money against the defendant "as Treasurer of the State

of California." The defendant pleaded the Eleventh Amendment. Jurisdiction was sustained by McKenna, J., at Circuit on the ground that the state had consented to be sued in its own court, and therefore a citizen of another state could sue in the federal court (Reinhart *v.* McDonald, 76 Fed. Rep., 403). He sustained a demurrer upon another ground, however. The Circuit Court of Appeals affirmed under the Eleventh Amendment, holding that the state could select the forum within which it shall be sued, and that practically a suit cannot be transferred for trial from the United States Circuit Court to the Superior Court for Sacramento County (Smith *v.* Rackliffe, 87 Fed. Rep., 964). This court affirmed upon the same ground.

Illinois Central Railroad Company v. *Adams,* 180 U. S., 28 (January 7, 1901. Brown, J.). Suit against the Railroad Commission of Mississippi to enjoin it from approving and certifying a certain assessment for taxes, and against the revenue agent of the state to enjoin the commencement of any suit for the recovery thereof. Bill dismissed for lack of jurisdiction, certifying the Eleventh Amendment among other questions. The court held that when suit is not against the state by name, the question of identification of the defendant with the state is "more properly the subject of demurrer or plea than of a motion to dismiss" (p. 37); but at any rate that the question must be raised by demurrer or other pleading, approving the practice in Fitts *v.* McGhee, where it was raised by answer (pp. 38-9). The point was therefore not decided.

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S., 79 (Decided November 25, 1901, after two

arguments. Brewer, J's. opinion is apparently concurred in by the whole court upon this point). This was a stockholders' suit against the defendant corporation, joining the Attorney General of Kansas. The relief sought was an injunction against charging more than the statutory maximum rates for yarding live stock. The statutory remedy was fine and imprisonment upon prosecution by the Attorney General for a misdemeanor (p. 83). The bill was dismissed below. It does not appear whether the Eleventh Amendment was pleaded by the Attorney General, but it was considered on its merits and the jurisdiction over the Attorney General sustained by Foster, J., at Circuit (79 Fed. Rep., at p. 601). Upon final hearing the point seems not to have been further insisted upon (82 Fed. Rep., 850). It was raised by the new Attorney General in the Supreme Court, who claimed that the suit would not lie against him, first because of the Eleventh Amendment, and second because it was an attempt to restrain criminal proceedings. Complainant contended that "it is not a suit against the state, because it does not in any way involve its pecuniary interest" (p. 113). The court expressed no opinion as to the jurisdiction, and nevertheless directed the entry of a decree dismissing the suit as to the Attorney General (p. 114).

Note.—So far as this may be regarded as a decision upon the Eleventh Amendment it is an application of the precedent of the dismissal of Carmichael in Fitts *v.* McGhee, *supra.*

Minnesota v. *Hitchcock,* 185 U. S., 373 (May 5, 1902). Brewer, J., refers at p. 386 to the Eleventh Amendment, and to the partial overruling of Osborn *v.* United States Bank by *In re* Ayers.

Prout v. *Starr*, 188 U. S., 537 (February 23, 1903. Shiras, J.; Harlan J., concurring in main in the decision reached, but not concurring in the reasoning of the opinion). This was one of the suits comenced contemporaneously with Smyth *v.* Ames, *supra*, and was similar to that suit in all respects. The then Attorney General had stipulated that the proofs in that case should be accepted as if taken in this case also; that this case should await the determination of the other in the Supreme Court; and that then "a decree should be entered conformable to those entered by the Supreme Court in the other three cases." Smyth, on succeeding to the office of Attorney General, violated both the pending injunction of the Circuit Court and this stipulation by bringing an action against the railroad company in the state court for 310,000 penalties. Upon his attention being called to the violation he "gave the counsel of the company to understand" that he would dismiss the action, and the matter was then dropped; but Prout, his successor, declined to dismiss it. The company then answered in the state court, setting up the prior pendency of the Circuit Court suit and the injunction therein; and, no reply having been filed, moved for judgment upon the pleadings, which motion was denied (61 Neb., 545). The complainant's stockholders then filed a supplemental bill in the Circuit Court, alleging the foregoing facts, and praying an injunction against Prout as Attorney General, restraining him from further prosecuting the state court action. Prout demurred to the supplemental bill under the Eleventh Amendment.

This court held that the former Attorney General had had authority to agree to abide by the decree in Smyth *v.* Ames, so that the Circuit Court was empowered to enter a similar decree in the present case. Prout having made the further

point that he could not be restrained from enforcing the criminal laws of the state, the court answered that he is not restrained from "prosecuing offenders against the *valid* criminal laws of the state" but only from enforcing "the provisions of a statute judicially determined to be void"; and that Prout could not attempt "to transfer the very matters that *stood for judgment* in the federal court to the state court by filing a bill in the latter."

Note.—The phrase "stood for judgment" seems to imply that, as one ground of the decision, the state had waived the Eleventh Amendment and permitted the suit to reach such a stage that nothing more but the formal entry of the final decree was necessary.

The distinction between "the *valid* criminal laws of the state" and other criminal laws would abrogate the Eleventh Amendment altogether, for of course a bill against a state, to declare its laws unconstitutional, would be dismissed if the laws were really constitutional.

Davis & Farnum Manufacturing Co. v. *Los Angeles*, 189 U. S., 207 (March 2, 1903. Brown, J.). This was a suit against the city of Los Angeles to restrain the erection or maintenance of gas tanks within certain portions of the city. Its relevance lies in its bearing upon the true ground of decision in Fitts *v.* McGhee, *supra*, which it mistakenly describes as a suit "against the Attorney General of the state to restrain *him* from instituting or prosecuting criminal proceedings" (pp. 217-18). In the Los Angeles case the only method employed for the enforcement of the ordinances was by criminal proceedings, so that the bill was

substantially one to enjoin the city from enforcing the ordinances. Plaintiff having relied upon the Reagan case, *supra*, where an injunction had been sustained against the Attorney General of Texas to restrain him from suing for penalties, the court say (p. 218): "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. *Springhead Spinning Co.* v. *Riley*, L. R., 6 Eq., 551, 558."

Note.—This denial of any substantial distinction, so far as equitable jurisdiction is concerned, based upon the technical difference in procedure between collecting penalties by civil action and collecting the same penalties by criminal prosecution, seems sound. It seems to be supported by the general tendency to treat all actions for penalties as quasi-criminal in nature, whatever court they may be brought in (The Burdett, 9 Pet., 682; Boyd *v.* United States, 116 U. S., 616, 633-4; Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 290, 299), and confirmed by the Dobbins case, *infra*.

Chandler v. *Dix*, 194 U. S., 590 (May 31, 1904, Holmes, J.). Bill against the Auditor General of Michigan to remove a cloud upon the title to complainant's land, by reason of tax sales. In some or all cases the state was the purchaser, and its title was the only one assailed. *Held*, a suit against the state. Other questions not considered.

Dobbins v. *Los Angeles*, 195 U. S., 223 (November 14, 1904. Day, J.). Error to the Supreme

Court of California. Its relevance lies in its bearing on Fitts *v.* McGhee. Plaintiff was engaged in erecting certain gas works upon property within defendant's territory, and had obtained a privilege from the fire commissioners. After this privilege was granted, an ordinance was passed limiting the boundaries within which gas works could be erected, and excluding plaintiff's premises therefrom. This is the same controversy which had been before the court in the Davis & Farnum case, *supra;* but the complainant in that case was a sub-contractor under the company with whom Mrs. Dobbins had contracted for the erection of the works, and was disposed of upon the ground that there was sufficient remedy at law against the contractor. Criminal prosecutions were then instituted by the city against plaintiff's employees for violation of the ordinance. Plaintiff sued for an injunction against such interference, and was unsuccessful in the state courts (139 Cal., 179). Reversed. The city urged that a bill in equity would not lie to restrain criminal prosecutions (195 U. S., at p. 233). The Supreme Court overruled this contention, saying that it did not apply where the prosecutions would render property rights worthless, following the Davis & Farnum case, *supra* (p. 241).

> *Note.*—Fitts *v.* McGhee was relied upon by the city (195 U. S., at p. 233). *Quaere* as to the extent to which the last ground stated in the opinion in that case is to be regarded as the law, in view of the case now under discussion.

Graham v. *Folsom,* 200 U. S., 248 (Dec. 8, 1905, McKenna, J.). Mandamus against the county auditor of Greenwood County, South Carolina, di-

recting him to collect taxes from the property within a certain former township, to pay its bonds. The duty originally seems to have pertained to the township treasurer. Subsequent legislation abolished the township, merged its territory into a newly formed county, and transferred the tax-collecting function to the county auditor, who was appointed by the Governor and forbidden by a subsequent statute to collect these taxes. This being unconstitutional and void, the mandamus was one for the enforcement of the original state statute, and the proceeding was ancillary to a suit long pending. Apparently the bonds, whose validity had already been established by this court, could in no other way be enforced. The Eleventh Amendment was urged, but the court did not consider the point worth discussion.

Gunter v. *Atlantic Coast Line,* 200 U. S., 273 (January 15, 1906. White, J.). Suit against the Attorney General of South Carolina and the treasurers of certain counties, for injunction against further prosecution of certain actions in the state courts, brought in the name of the state, to enforce payment of taxes. The suit was "filed as ancillary" (p. 281) to a suit brought long before to which the predecessor of the present complainant and the treasurers of two of said counties were parties, and in which the answer of the treasurers had been signed for them by the Attorney General of the State, apparently without pleading the Eleventh Amendment, and in which a final decree had passed in favor of the complainant perpetually enjoining the collection of the taxes (p. 278). That decree had been affirmed (Humphrey *v.* Pegues, 16 Wall., 244). The court holds that the present case is merely ancillary to the Pegues case, and on that ground

cite Prout *v.* Starr, *supra,* and distinguish *In re* Ayers and Fitts *v.* McGhee, *supra,* saying that the Eleventh Amendment does not apply to cases where jurisdiction "has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination" (pp. 291-2); that the state voluntarily waived its privilege in the Pegues case by appearing through the Attorney General and defending it upon the merits (pp. 284-8).

McNeill v. *Southern Railway,* 202 U. S., 543 (May 28, 1906. White, J.). Suit against a certain ice and coal company and against the North Carolina Corporation Commission, to enjoin them from bringing actions to recover penalties or damages because of complainant's non-compliance with an order of the commission which required complainant to make delivery of cars upon the defendant company's siding. Some of these penalties were recoverable "in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the corporation commission" (pp. 545-6). The theory of the bill is that the defendants are interfering with interstate commerce (See Record, pp. 2-3, 7). At Circuit (134 Fed. Rep., at p. 93), the question of the Eleventh Amendment was raised and overruled upon the authority of Scott *v.* Donald, *supra.* The point was not made here, but was waived by omitting it from the assignment of errors (McNeill Brief, pp. 19-22, 23-4). It is nevertheless referred to in the opinion, which says that the suit "was not in any proper sense one against the state," because "the real object of the bill" was to restrain "illegal interference with the property and interstate business of the railway company" (p.

559) under a state statute alleged to be unconstitutional, citing Scott *v.* Donald, at p. 112, and Fitts *v.* McGhee, at pp. 529-30.

> *Note.*—Here, as in Smyth *v.* Ames, the remarks of this court were *obiter,* and without the assistance of counsel for the state. It seems to be not uncommon for a state to drop the Eleventh Amendment when the case reaches here, (there are other such cases, in which the point is not alluded to), the reason doubtless being that the record satisfactorily raises the main point which has got to be decided by this court ultimately anyhow, so that no advantage would be gained by throwing out the case and coming up here again *via* the state courts, perhaps with a record less satisfactory. Unfortunately the counsel for the state do not always have the possibility of similar future litigations in mind, and therefore do not always make their waiver express; so that sometimes it is overlooked, and remarks are made in the opinion which are based on a most one-sided presentation to the court of the authorities and questions involved.

Mississippi Railroad Commission v. *Illinois Central R. R. Co.,* 203 U. S., 335 (December 3, 1906. Peckham, J.). Suit to restrain the enforcement of an order of the Mississippi Railroad Commission, which order compelled the through express trains of the complainant to stop at the small town of Magnolia, alleging that the order "was a direct burden upon interstate commerce and also a direct and unnecessary interference with the speedy carriage of the mails of the United States" (p. 339). The Mississippi code provided that penalties for failure to comply with

lawful orders of the commission shall be recovered by action in the name of the commission, and that it is the commission's duty to see that all laws civil and penal affecting railroads are complied with, and to prosecute all offenders (Code of 1892, §§4329, 4331). This court disposed of the Eleventh Amendment by simply citing Reagan *v.* Farmers' Loan & Trust Co., Smyth *v.* Ames and Prout *v.* Starr, *supra,* making no reference to Fitts *v.* McGhee, *supra.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 10, Original.

In the Matter of EDWARD T. YOUNG, Petitioner.

I, William H. Grimshaw, United States Marshal for the District of Minnesota, show cause in obedience to the order of this Court, returnable the second day of December, 1907, and say that the Petitioner, Edward T. Young, is, as alleged, held in custody, detained and restrained of his liberty by me, and that he is so held in custody, detained and restrained by virtue of the order of the Circuit Court of the United States, dated October 21, 1907, set forth in the petition of the said Edward T. Young to this Court.

I deny that the said custody, detention and restraint is unjust or unlawful, and submit to the Court that the said order of the Circuit Court of the United States is lawful and that I am bound to obey the same.

To the best of my knowledge, information and belief, the petition correctly sets forth the pleadings, proceedings, orders, decrees and other matters appearing of record in the Circuit Court of the United States for the District of Minnesota, pertaining to the said order of the Court made October 21, 1907.

Nov. 23rd, 1907.

WILLIAM H. GRIMSHAW,
United States Marshal.

Office Supreme Court, U. S.
FILED.
DEC 2 1907

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 10, Original.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

The undersigned respectfully moves for leave to file a brief herein as *amicus curiæ*.

Notice of this application has been given to both parties, and copies of the brief were given them last week, and no objection to the filing of the brief has been made by either of them. Notice of the application was given a week ago also by me to James M. Beck, Esq., of counsel for the Consolidated Gas Company of New York, and I was not informed until this morning that he would object thereto.

The application is made at request of the Public Service Commission of the State of New York for the First District. That commission has in relation to railroad and lighting matters the same functions which the petitioner has in the State of Minnesota as to mandamus proceedings. A suit is

now pending in the United States Circuit Court for the Southern District of New York, in equity, in which it is a defendant, and in which the said Consolidated Gas Company of New York is complainant, in which a similar question arises, and which case has been finally heard by said court, but is as yet undecided. The counsel for the said commission do not concur with all the positions taken by the petitioner herein, although believing that his petition should be granted. It is the belief of the undersigned that the brief aforesaid will be of material assistance to the court, and without expectation or desire that any questions not involved necessarily in the present proceeding will be decided herein.

EDWARD B. WHITNEY,
Of Counsel for Public Service Commission
of the State of New York for the First District.

DECEMBER 2, 1907.

Office Supreme Court, U. S.
FILED
DEC 18 1907
JAMES H. MCKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 10, Original.

EX PARTE: IN THE MATTER OF EDWARD T. YOUNG, PETITIONER.

LETTER OF J. F. McGEE, OF COUNSEL FOR RESPONDENT.

William A. Lancaster. John F. McGee. George A. Lyon.

Lancaster and McGee, Attorneys and Counsellors at Law, New York Life Building, Minneapolis, Minn.

DEC. 11, 1907.

Hon. MELVILLE W. FULLER,
Washington, D. C.

MY DEAR SIR: Referring to the case of *Ex parte* Young, argued on the 2nd and 3d inst., you will recall that Mr. Hadley, the Attorney General of the State of Missouri, made the statement that the bill in the case of Perkins and Shepard *vs.* The Northern Pacific Railway Company did not charge confiscation as to the Commodity Act of April 18, 1907—a statement which I corrected later in the course of my argument, and in doing so I explained the difficulty that confronted any person not familiar with the record in this *habeas corpus* proceeding, and on reflection have concluded to call your attention to the same situation.

The bill proper appears on pages 7 to 16 of the record, but has been amended twice in important particulars; but the amendments do not appear in the printed record in connection with the bill at all, nor is there anything in the form of an index that would enable you to locate the amendments.

Of course, to any person who has been in the litigation from the beginning and knows that the amendments were made, it simply takes time and industry to find them in the printed record; but a person not familiar with the litigation might very readily and easily overlook their existence; and, having that thought in mind, it occurred to me to write and call your attention to where these amendments can be found—something that, of course, would be unnecessary if the record were indexed.

Paragraph XI of the bill was amended, by order dated August 3, 1907, by striking from that paragraph everything after the words "prior to the institution of this suit" and inserting in lieu thereof, as an amendment, what appears on the upper two-thirds of page 62 of the record in this proceeding.

At the same time there was added, by way of amendment, after paragraph XI, a new paragraph designated as paragraph XI*a*, which does not appear in the printed bill, but appears on the lower part of page 62 of the record.

The bill was again amended, by an order dated September 10, 1907, so as to more specifically allege confiscation as to the merchandise order of September 6, 1906, and the Commodity Act of April 18, 1907; and this amendment will be found on page 92 of the record, and is in lieu of the concluding paragraph of subdivision X of the bill, which concluding paragraph is, by the amendment, expressly stricken from the bill.

It would, of course, have been much better, in printing the record, to have inserted the amendments in their places in the bill, omitting the portions of the bill which were, by order of the court allowing the amendments, stricken out.

Very truly yours, J. F. McGee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 10, ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, Petitioner.

BRIEF IN BEHALF OF THE PETITIONER.

HERBERT S. HADLEY,
Attorney-General of the State
of Missouri.

F. W. LEHMANN,
Of Counsel.

THE HUGH STEPHENS PTG. CO., JEFFERSON CITY, MO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

NO. ———. ORIGINAL.

IN THE MATTER OF EDWARD T. YOUNG, Petitioner.

BRIEF IN BEHALF OF THE PETITIONER.

STATEMENT OF FACTS.

On the 31st day of May, 1907, Charles R. Perkins, a citizen and resident of Iowa, and David C. Shepard, a citizen and resident of the state of Minnesota, as stockholders of the

Northern Pacific Railway Company, brought a suit in equity in the Circuit Court of the United States for the Third Division of the District of Minnesota against the Northern Pacific Railway Company, a corporation of Wisconsin, the petitioner; Edward T. Young, Attorney-General of the state of Minnesota; Ira B. Mills, Charles F. Staples and William E. Young, the members of the Board of Railroad and Warehouse Commissioners of the state of Minnesota, and six persons residents and citizens of the state of Minnesota, designated in the bill of complaint as shippers upon the line of said railroad.

This bill alleged that the Legislature of the state of Minnesota had, on the 4th day of April, 1907, passed a law fixing a maximum passenger rate of two cents a mile for intra-state passenger business, and by an Act of April 18, 1907, fixed maximum freight rates upon certain commodities designated therein; that the Board of Railroad Commissioners had, upon the 6th day of September, 1906, and by an order supplemental thereto, on May 3, 1907, established maximum freight rates upon certain commodities named in said orders. The bill alleged that the enforcement of these rates would be confiscatory, in that the Northern Pacific Railroad Company would thereby be deprived of a fair and just compensation in the carrying on of its freight and passenger business in the state of Minnesota, and that such orders and legislative acts also were an interference with interstate commerce.

The legislative acts referred to in the bill were, according to their provisions, to become effective upon the 1st day of June, 1907.

The prayer of the bill, in so far as it asked for any injunctive relief against the Board of Railroad Commissioners and the Attorney-General, is as follows:

> "That the said Edward T. Young, as Attorney-General of the state of Minnesota, and Ira B. Mills, Charles F. Staples and William E. Young, as the Rail-

road and Warehouse Commission of the state of Minnesota, be temporarily and permanently restrained and enjoined from any attempt to compel said railway company to observe, publish, post, or put in force, said rates, or any of them, as fixed by said order of September 6, 1906, or said order of May 3, 1907; and, further, be temporarily and permanently restrained and enjoined from taking any action, step or proceeding against said railway company, or any of its officers, directors, agents or employes, to enforce any penalties or remedies for the violation by said railway company of said orders, or either of them.

That said Edward T. Young, as Attorney-General, be temporarily and permanently enjoined and restrained from taking any action, step or proceeding against said railway company, its officers, agents or employes, to enforce the penalties and remedies specified in said Acts of April 4, 1907, and April 18, 1907, or either of them."

Subpoenas were issued, directed to defendants, and a rule or order to show cause why they should not each be temporarily enjoined during the pendency of the action, as prayed in the bill of complaint.

The Attorney-General, Edward T. Young, entered a special appearance, and moved for a dismissal of the action, as to him, upon the grounds, as set out in the motion, that the suit, in so far as he was concerned, was in effect a suit against the state of Minnesota, and, as such, prohibited by the eleventh article of amendment to the Constitution of the United States, and that the Circuit Court, therefore, had no jurisdiction to entertain the suit as to him. This motion was denied, and the Attorney-General thereupon made a return to the order to show cause, asking that no temporary injunction issue upon practically the same grounds alleged in the motion. The

Court again denied this claim, and the Attorney-General filed a demurrer, in which was reiterated his contention that the Court was without jurisdiction to entertain the action or control his executive discretion, and, therefore, the suit was against the state of Minnesota; that the bill was multifarious, and the facts set out in the petition did not show that the 94th equity rule had been complied with.

Demurrers were filed in behalf of the other defendants, who also opposed the issuance of the temporary injunction upon the merits.

Upon the 23rd day of September, 1907, the Court overruled the demurrers filed by the Attorney-General and members of the railroad board and the other defendants, but declined to issue a temporary injunction enjoining the railroad board from enforcing its orders of September 6, 1906, and May 3, 1907, establishing a schedule of certain maximum freight rates, and refused to enjoin any of the defendants from enforcing the provisions of the passenger rate Act of April 4, 1907. The Court, however, granted an injunction enjoining the Attorney-General of Minnesota from instituting any suit or proceeding to enforce the Act of the Legislature of that state of April 18, 1907, establishing a schedule of maximum freight rates upon certain commodities. The order of the Court, in so far as it related to the Attorney-General, and the act in question, is as follows:

> "That you, Edward T. Young, as Attorney-General of the said state of Minnesota, are, pending the final hearing of this cause, and until the further order of the Court in the premises, restrained and enjoined from taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said act, or either, thereof, or to compel obedience to said act or compliance therewith, or any part thereof."

On the 24th day of September, 1907, there was begun in the District Court of the Second Judicial District of Minnesota, in and for the county of Ramsey, a suit in mandamus by the state of Minnesota, on the relation of Edward T. Young, Attorney-General, against the Northern Pacific Railway Company, in which the Court was asked to direct the issuance of a writ of mandamus commanding the Northern Pacific Railway Company to comply with the Act of the Legislature of Minnesota of April 18, 1907, or show cause for its refusal so to do. The Court ordered the issuance of an alternative writ of mandamus, directed to the respondent, as prayed for in the petition, and it was issued and served upon the railroad company.

On the 11th day of October, 1907, upon the affidavit of one of the solicitors for the complainants in the suit in the Circuit Court, an order was issued by that Court, directing that Attorney-General Young show cause before that Court on the 21st day of October, why he should not be adjudged guilty of contempt, and be punished therefor, because of the institution of the mandamus proceeding in the state Court. Mr. Young made his return to the order to show cause, and thereupon he was by the Honorable William Lochren, sitting as Circuit Judge, adjudged guilty of contempt, and by an order thereupon made, directed to dismiss the action against the Northern Pacific Railway Company, commenced in the state Court, and to pay a fine of one hundred dollars, and was committed to the custody of the marshal until the order was obeyed.

Thereupon, Mr. Young filed an application for a writ of habeas corpus in the Supreme Court of the United States, upon the following grounds:

1. The Circuit Court was without jurisdiction of the action in which the temporary injunction was rendered against him, as there was no diverse citizenship between the parties, nor was any Federal question involved.

2. That the suit so instituted against him as Attorney-General, to restrain the exercise by him of his executive discretion, and to control his official action was, in effect, a suit against the state of Minnesota, and the Circuit Court was, therefore, entirely without jurisdiction to entertain it.

3. That the order of the Circuit Court made in that suit, restraining the petitioner from the exercise of his executive discretion vested in him by the Constitution and laws of the state of Minnesota, as Attorney-General, was beyond the jurisdiction, power and authority of the Circuit Court of the United States.

Upon this application, a writ of habeas corpus was granted by the Supreme Court to the United States marshal for the Third Division of the District of Minnesota.

The act of the state of Minnesota, which the Attorney-General was enjoined from instituting any suit or proceeding to enforce by the order made by the Circuit Court of the United States upon the 23rd day of September, 1907, was as follows:

> "Section 4. No railroad company, which is a common carrier of property within the state of Minnesota, shall charge, take or receive any greater sum for carrying within this state, between stations therein, any of the commodities named in this act, than the respective amounts set forth, and provided in section two of this act for the respective distances therein named.
>
> Section 5. This act shall not in any manner affect the power or authority of the Railroad and Warehouse Commission, except that no duty shall rest upon the Railroad and Warehouse Commission to enforce any rates specifically fixed by this or any other statute of this State. Whenever in a proceeding regularly pending before the Railroad and Ware-

house Commission, it shall be made to appear to the satisfaction of said commission, that the rates herein prescribed are unreasonable, it may, by order, fix higher or lower rates, for the transportation of any of the commodities herein mentioned over the line of any railroad in this state, and such rates, when so fixed, shall supersede the rates herein prescribed upon said line of railroad, and shall be enforced as prescribed by the law relating to such orders, but until such order shall have been made by said Railroad and Warehouse Commission, the rates herein prescribed shall be exclusive legal maximum rates for the transportation of the commodities herein enumerated between points within this state.

Section 6. Every railroad company transacting the business of a common carrier within this state shall adopt and publish, and put into effect rates not exceeding the charges specified herein for the transportation by it between stations upon its line of road in this state of the commodities named in this act; and every officer, director, traffic manager or agent or employe of such railroad company, exercising any authority, or being charged with any duty in establishing freight rates for such railroad company, shall cause the adoption, publication and use by such railroad company of rates not exceeding those specified in this act; and any officer, director, or such agent or employe of any such railroad company, who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof, be punished by imprison-

ment in the county jail for a period not exceeding ninety days.

Section 7. If, at any time of taking effect of this act, any railroad is maintaining a rate between any two stations in this state that is less than the rate herein prescribed for the same distance, this act shall not be construed as authorizing the raising of such rate.

Section 8. This act shall take effect and be in force from and after June 1, 1907."

And it was for instituting a suit in mandamus in the name of the state of Minnesota to compel the Northern Pacific Railway Company to comply with this law that the Attorney-General was adjudged guilty of contempt.

BRIEF AND ARGUMENT.

The one question that will be dealt with in this brief and argument is as to whether the suit instituted in the United States Circuit Court for the Third Division of the District of Minnesota against the Attorney-General, was a suit against the state of Minnesota, and, therefore, prohibited by the eleventh article of amendment to the Federal Constitution.

The other questions raised by the application for a writ of habeas corpus are fully considered in the brief of other counsel for the petitioner.

In the discussion of this question, we will undertake to consider only such cases as directly bear upon the question in controversy. As was said by Mr. Justice Harlan in Fitts v. McGhee, 172 U. S. l. c. 525:

> "What is and what is not a suit against a state has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain in each case as it arises whether it falls on one side or the other of the line marked out by our former decisions."

And in undertaking to consider this question, it will be more satisfactory and helpful to the Court to adopt a course of exclusion and inclusion to determine whether this is or is not a suit against a state, than to undertake to establish any one controlling distinction from the decisions bearing upon this question. To undertake to apply any one controlling principle to all of the cases in which this question has been dealt

with cannot but result in more or less uncert[illegible]y as to the exact distinctions thereby sought to be est[illegible]ished. Certain principles can, however, be deduced from the leading and controlling authorities by which the proper classification of this case can be effected.

In the consideration of this question, it is not deemed necessary to undertake a review or discussion of all those cases in which it has been necessary to construe the provisions of the eleventh article of amendment in suits against officers of a state. While much that is said in these cases is, by inference, directly applicable in this case, it is submitted that the controlling principles, determining whether this suit is or is not within the provision of the eleventh amendment, are to be found in a few leading cases in which facts similar to those in the case at bar came before the Court for consideration. From those cases it can be stated as being the settled doctrine of this Court, that in order that a suit at law or in equity can be considered as prohibited by the eleventh amendment, it is (1) not necessary that the state should, in name, be a party to the record; (2) it is not necessary that some money demand or property interest belonging to the state in its corporate capacity should be the subject-matter of litigation.

In a suit in equity against an officer of the state, in which it is sought to enjoin him from taking some official action, the suit is inhibited by the eleventh amendment when he "represents the state's action and liability," when he acts "*virtute officii*, rather than *colore officii*." And he can be properly regarded as representing the state's action and liability when (1) he institutes a formal judicial proceeding in the name of the state in the Courts of the state to secure the enforcement of a state law; (2) when he has the right to exercise an executive discretion as to whether he will or will not institute such a suit; (3) when by reason of such suit he can incur no personal liability to the persons against whom the proceedings are brought; (4) when he is not specially charged with the duty

of instituting a particular proceeding to enforce a state law, in such a manner as to make his action in that regard the performance of a mere ministerial duty.

It is submitted that all of these tests which are declared by the decisions of this Court as necessary incidents of a suit in violation of the eleventh amendment, exist in the case at bar. Counsel for the petitioner in the Circuit Court relied particularly upon the decisions in Reagan vs. Trust Company, 154 U. S. 362, and Smythe vs. Ames, 169 U. S. 466, in support of their contention that this suit was not a suit against the state. A consideration of those cases shows that they are readily distinguishable from the case at bar.

Reagan vs. Trust Company, 159 U. S., 362.

In the Reagan case, decided by this Court in 1893, the question raised for consideration was the right of stockholders of railroads doing business in the state of Texas to an injunction against the state railroad board and Attorney-General from enforcing a schedule of state rates, which the board had fixed under authority of an act of the Texas Legislature passed in 1891. That act, in addition to authorizing the Board of Railroad Commissioners, of which the Attorney-General was not a member, to establish a schedule of maximum rates, provided, section 19, that suits for the penalties imposed by the act should be brought in the name of the state by the Attorney-General, and it was provided by section 21 of the act that the railroad commission should "see that the provisions of this act and the laws of this state concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the state therefor recovered and collected; and said commission shall report all such violations, with the facts in their possession, to the Attorney-General or other officer charged with the enforcement of the law, and request him to institute the proper proceedings." The pro-

visions of the act, in so far as they related to the enforcement of the penalties provided for its violation, were mandatory, both upon the railroad commission and the Attorney-General. The Court in that case, in the opinion written by Mr. Justice Brewer, held that the suit was not prohibited by the eleventh amendment. The Court quoted, with approval, the following classification by Mr. Justice Lamar, in Pennoyer vs. McConaughy, 140 U. S. 1, as to those cases which are and those which are not prohibited by the eleventh amendment, l. c. 389:

> "The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayers, 123 U. S. 443; Louisiana vs. Jumel, 107 U. S. 711; Antoni vs. Greenhow, 107 U. S. 769; Cunningham vs. Macon & Brunswick Railroad, 109 U. S. 446; Hagood vs. Southern, 117 U. S. 52.
>
> The other class is where a suit is brought against defendants, who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the

> eleventh amendment, an action against the state. Osborn vs. Bank of the United States, 9 Wheat. 738; Davis vs. Gray, 16 Wall. 203; Tomlinson vs. Branch, 15 Wall. 460; Litchfield vs. Webster County, 101 U. S. 773; Allen vs. Baltimore & Ohio Railroad, 114 U. S. 311; Board of Liquidation vs. McComb, 92 U. S. 531; Poindexter vs. Greenhow, 114 U. S. 270."

The jurisdiction was sustained upon the ground that the case came within this second class, and that the state had no pecuniary interest in the controversy as "the only persons as parties pecuniarily affected are the shippers and carriers." The further point was urged, in support of the jurisdiction of the Circuit Court, that the state of Texas had by the act itself, given "express authority" for a suit to determine the constitutionality of its orders in the United States Courts. In so far as the jurisdiction in the Reagan case was based upon the ground that the state, as a political corporation, separate and distinct from the persons who composed it, had no pecuniary interest in the result of the controversy, it is plainly at variance with the subsequent decision in Fitts vs. McGhee, 172 U. S. 516. And Mr. Chief Justice Fuller, in Barney vs. City of New York, 193 U. S. 432, l. c. 44, in referring to the Reagan case, stated that the jurisdiction was sustained in that case on the ground that the suit was "authorized by the state statute."

It is to be noted that no duty is imposed upon the Board of Railroad Commissioners or the Attorney-General of Minnesota by the provisions of the Act of the Legislature of that state of April 18th, 1907. The injunction in this case, in so far as that act is concerned, is not prayed for as against the members of the commission, and the decree asked for against the Attorney-General in no way seeks to enjoin him from doing any act which it was made his mandatory duty to perform under the provisions of the Minnesota laws.

Consequently, with these distinctions in mind, and reading the Reagan case in connection with the decision in Fitts vs. McGhee, which denies the force of the "pecuniary interest" theory, which is applied in the former decision, it must be at once apparent that the decision in the Reagan case is not an authority in support of the jurisdiction claimed in this case.

Smythe vs. Ames, 169 U. S., 466.

In Smythe vs. Ames, decided by this Court, in 1897, the Act of the Nebraska Legislature passed in 1893, which was the subject-matter of consideration, provided that when any common carrier should violate or refuse to obey the act or any legal order of the board, made under the provisions of the act, "it shall be the duty of the board * * * to plead, in a summary way, by petition filed in the judicial court of the district;" * * * and section 19 provided that "if such railroad shall refuse or neglect to comply with such order, the board shall order the Attorney-General or the county attorney of the proper county to institute a suit to compel such railroad company to comply with such order, and it shall be the duty of the Attorney-General or the county attorney of the proper county, at the request of the board, to apply to the Supreme Court for a writ of mandamus, to compel such railroad to comply with such order." Penalties were also provided for the violation of the act, the enforcement of which was made the mandatory duty of the Board of Railroad Commissioners, and the Attorney-General. The injunction, however, restrained the board from enforcing the penalties of the act, and also the Attorney-General from instituting a suit in mandamus to compel the railroads to comply with the provisions of the act or the orders of the board made thereunder. The contention that the action in that case was a suit against the state was not urged in argument by any of the counsel representing the state officers. As the point was, however, presented by the general

assignment of errors, the Court considered the question, and in the opinion written by Mr. Justice Harlan, all that was said as to whether the suit was or was not prohibited by the eleventh amendment, was as follows:

> "It would, therefore, be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction, not only upon the ground of the diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska, under which the State Board of Transportation proceeds us, assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that, within the meaning of the eleventh amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional right of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment. Pennoyer vs. McConnaughy, 140 U. S. 110; In Re Tyler, 149 U. S. 164, 190; Scott vs. Donald, 165 U. S. 58, 68;
>
> Tindal vs. Wesley, 167 U. S. 204, 220."

It is to be noted that the jurisdiction in that case is sustained upon the sole ground that officers of a state could be enjoined from enforcing an unconstitutional enactment, while in the Reagan case it was said, l. c. 390:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon the individual. * * * * They may go beyond the powers thereby conferred, and when they do so, the fact that they are assuming to act under a valid law will not oust the Court of jurisdiction to restrain from excessive and illegal acts."

The Texas statute, however, provided no schedule of rates, simply authorizing the state board to establish them, while the Nebraska statute fixed a schedule of maximum state rates within which maximum the officers of the board were themselves authorized to establish rates. It was, however, the rates fixed by the Legislature which were contested as unreasonably low, and, therefore, confiscatory in the case of Smythe vs. Ames. It is to be noted that in the case of Smythe vs. Ames, all the duties imposed by the provisions of the act for the purpose of its enforcement were made mandatory, both upon the members of the board and also upon the Attorney-General, while the act of the Minnesota Legislature imposes no duties, mandatory or discretionary, upon either the Board of Railroad Commissioners or the Attorney-General. It was upon such a difference as this, that the decision in Smythe vs. Ames was distinguished in the case of Fitts vs. McGhee.

Fitts vs. McGhee, 172, U. S., 516.

The case of Fitts vs. McGhee, which came before the Supreme Court for decision in 1899, involved, in the form in which it was finally submitted for decision, the right of a railroad company doing business in that state to enjoin the Attorney-General and prosecuting attorney of one of the counties of the state from "instituting or procuring the institution of

any proceeding against the plaintiffs, or either of them, by mandamus, or otherwise, to compel the observance of and obedience to the act in reference to the rate of tolls fixed thereby over the Florence bridge, and from instituting or procuring to be instituted any proceeding against the plaintiffs, or either of them for the forfeiture of the franchise of the Memphis & Charleston Railroad Company in and to the bridge on account of the refusal to charge the rates or toll over it fixed by the act."

As it is contended, that the decision in Fitts vs. McGhee has not been modified or overruled by any subsequent decision of this Court, and that it is identical in its substantive facts with the case at bar, it is important to note the provisions of the act in question in that case, and the powers conferred by the Constitution and statutes of Alabama upon its Attorney-General, as compared with the provisions of the act in question in this case, and the powers conferred upon the Attorney-General of Minnesota by the Constitution and statutes of that state. The Act of the Legislature of Alabama, approved February 9, 1895, established a schedule of maximum tolls to be charged on a bridge across the Tennessee river, known as the Florence bridge. It provided a penalty for the violation of the act, which could be enforced by any person who was required to pay a rate in excess of that provided for by the act. The statutes of the state, section 4151, also made it a misdemeanor for any person or corporation to charge a bridge toll in excess of the rates fixed by the act of the Legislature. By the provisions of the Constitution of Alabama, it was provided, article V, section 1, "the executive department shall consist of the Governor, Secretary of State, State Auditor, Attorney-General," etc. And it was further provided, article V, section 24, and article VI, section 27, as to the powers of the Attorney-General that "He shall be the law officer of the state, and shall perform such duties as may be required of him

by law." It was provided by legislative enactment, article V, section 2027 to 2033, that he should be the attorney for the different officers of the state, argue criminal appeals in the Supreme Court, represent the state in civil suits in the Supreme Court and in Federal courts, and by section 2029 it was provided, "The Attorney-General is authorized to institute and prosecute in the name of the state all suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state." There was no provision in the statutes of the state authorizing him of his own initiative or volition to institute or prosecute, or assist in the prosecution of criminal offenses, the solicitors of the various counties being made the primary representatives of the state in such cases.

An injunction was asked for in that case upon the ground that the act in question violated section 1, article 10, and the fourteenth amendment to the Constitution of the United States, in that it violated the terms of a previous contract, and that the rates fixed were "unreasonable, and amounted virtually to the confiscation of the plaintiff's property, in that such a legislative enactment deprived the owners of the bridge of their property without due process of law and denied to them the equal protection of the law." In the decision written in that case by Mr. Justice Harlan, it was held that the suit was a suit against the state, and, therefore, prohibited by the eleventh amendment. The previous decisions rendered in the Reagan case and Smythe vs. Ames were distinguished from the facts of that case in the following language:

> "It is to be observed that neither the Attorney-General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the state appear to have been charged by law with any special duty in connection with the Act of February 9, 1895. In support of the contention that the present suit is not one against the

state, reference was made by counsel to several cases, among which were Poindexter vs. Greenhow, 114 U. S. 270; Allen vs. Baltimore & Ohio Railroad, 114 U. S. 311; Pennoyer vs. McConnaughy, 140 U. S. 1; In re Tyler, 149 U. S. 164; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 388; Scott vs. Donald, 165 U. S. 58, and Smythe vs. Ames, 169 U. S. 466. Upon examination, it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney-General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and

the latter, as Attorney-General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land, for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.

What has been said has reference to that part of the final decree which holds the act of February 9, 1895, to be invalid and inoperative. Whether the owners of the bridge, and the plaintiffs as their representatives, were denied by the statute fair and reasonable compensation for the use of the property by the public, was a question that could not be considered in this case. This is not a matter to be determined in a suit against the State; for of such a suit the circuit court could not take cognizance."

It was also held on the authority of In re. Sawyer, 124 U. S. 200, that the Circuit Court of the United States was without jurisdiction to enjoin the prosecution of the suit on the ground that it would thereby be enjoining the prosecution of

criminal proceedings. The decision in Fitts vs. McGhee relies particularly upon the former decision of the Supreme Court in Re. Ayres, 123 U. S. 443, and the court quoted, with approval, the following language, l. c. 528:

> "To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also, against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

This language is subject only to the construction that any suit against an officer of a state in which it is sought to restrain him from instituting "judicial proceedings" to enforce the laws of the State, is as much against the State as if the State were named as a party defendant on the record.

FITTS VS. McGHEE COMPARED WITH THE CASE AT BAR.

It cannot but be helpful and important to compare the facts presented by the acts in question in the Alabama case with the facts presented by the acts in question in this case. The act of the Minnesota legislature establishing a schedule of maximum freight rates is in itself a complete scheme of legislation. It imposes no duty upon the board of Railroad Commissioners or the Attorney-General to enforce it. The violation of the act is made a misdemeanor as was the violation of the Alabama law made a misdemeanor by the statutes of that state. By the provisions of the Constitution of Minnesota, section 1, article V, it is provided, "The executive department shall consist of the Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer and Attorney-General." By the statutes of Minnesota, the Attorney-General is required to appear in the Supreme Court of the State and in the Federal court in all cases in which the State is directly interested. But he has no power to institute or prosecute criminal proceedings unless specially authorized so to do by the Governor of the State. By the provisions of the Constitution and statutes of Minnesota, the Attorney-General is made the chief law officer of the State with such powers as attach to the office of Attorney-General at common law, and by section 58, Revised Laws 1905, it is provided that "whenever any corporation shall have offended against the laws of the State, he shall cause proceedings to be instituted against it." He was also made by law the attorney of the Railroad Commission. These two latter enactments gave him no power which he would not have possessed as chief law officer of the State.

In all regards, the powers of the Attorney-General of Alabama, under the constitution and laws of that state, to institute proceedings to enforce the act of the legislature of that state, considered in the case of Fitts vs. McGhee, were the same as the powers and duties of the Attorney-General of Minnesota, to institute proceedings to enforce the provisions of the act of the Minnesota legislature in question in this case. Applying the language of Fitts vs. McGhee to this case, "it is to be observed that the Attorney-General of Minnesota does not appear to have been charged by the law with any special duty in connection with the act of April 18, 1907." The one thing that the Attorney-General might do or has done to secure the enforcement of that act he has done "only by formal judicial proceedings in the courts of the State." It is to be noted that the injunction in this case is not asked for to restrain the Railroad Board from enforcing the provisions of the act in question, for, manifestly, the Railroad Board could take no action, directly or indirectly, to enforce the provisions of this act. The Attorney-General, against whom alone the injunction is sought, could do nothing to secure the enforcement of this act except "by formal judicial proceedings in the courts of the State" by virtue of his "general authority" as the chief law officer of the State, and "in the present case neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

No valid distinction can be made between the proceedings in these cases. In the Alabama case, a schedule of maximum rates for intra-state traffic was sought to be enjoined upon the ground that the same were unconstitutional, in that they violated the provisions of the contract clause of the Federal Constitution and the fourteenth amendment. In the present case a schedule of maximum rates for intra-state traffic is sought to be enjoined upon the ground that it violates the commerce

clause of the Constitution of the United States and the fourteenth amendment. The violation of the act of each state was made a misdemeanor. The injunction in the Alabama case was asked for as against the Attorney-General and the prosecuting attorney of one of the counties of the State, and the injunction in this case is asked for against the Attorney-General alone. The fact that in the Alabama case the solicitor of one of the counties of the State was joined with the Attorney-General and that in this case the Board of Railroad Commissioners is joined as defendants, but not involved in the prayer of injunction in so far as it related to the act in question, can in no way affect the principles that should control in each case. We confidently submit, therefore, that the facts of this case are readily distinguishable from the facts presented in the Reagan case, or in Smyth vs. Ames, and we think cannot be distinguished in principle from the facts presented in Fitts vs. McGhee. It only remains, therefore, to consider as to whether the principles announced in Fitts vs. McGhee have been modified or overruled by any subsequent decisions of this court. If they have not, then there can be no escape from the conclusion that the decision in that case is a controlling authority in this one.

SUBSEQUENT DECISIONS.

The question as to whether a suit is or is not a suit against the State, and prohibited by the eleventh amandment, has been frequently considered by this court since the decision in Fitts vs. McGhee, but the only cases in which the questions there discussed have been expressly considered, are in the following cases, in none of which was it suggested or intimated that the court intended to modify the doctrine announced in that controlling authority.

In Smith vs. Reeves, 178 U. S. 436, in an opinion written by Mr. Justice Harlan, a motion to dismiss, upon the ground that the suit was a suit against the State, was sustained. The object of the suit was to require the treasurer of California,

to pay out money alleged to have been unlawfully paid as taxes. The court said, l. c. 438:

> "Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money."

The principal question considered and discussed in that case was as to whether the State of California had, by legislative enactment, given its consent to such a suit in the United States circuit courts, and in the consideration of that question the case of Smyth vs. Ames and the Reagan case were considered and distinguished. The case of Fitts vs. McGhee was not considered or mentioned in the decision. The decision In re. Ayres was referred to in support of the proposition that the suit "though in form against an officer of the State, is against the State itself." The decision in that case, therefore, leaves the doctrine of Fitts vs. McGhee, unmodified and unimpaired.

In the case of Cotting vs. Goddard, 183 U. S. 79, in the opinion written by Mr. Justice Brewer, the court dismissed a suit against the Attorney-General of Kansas, who was joined as a defendant with the Kansas City Stock Yards Company in a suit in injunction in the United States circuit court by one of the stockholders of that company to have an act of the Kansas Legislature declared unconstitutional as in violation of the fourteenth amendment. The contention that the suit, in so far as the Attorney-General was concerned, was a suit against the State and, therefore, prohibited by the eleventh amendment as construed in Fitts vs. McGhee, was not raised

in the trial court, in which court the Attorney-General made no objection to the jurisdiction, but submitted the case upon the merits. In addition to the contention that the suit was, in effect, a suit against the State, the Attorney-General, who was authorized by the act to institute criminal proceedings, denied the jurisdiction of the court on the ground that it was an attempt to restrain criminal proceedings. In answer to these contentions, it was urged that the suit was not a suit against the State, because the State had no pecuniary interest in the result of the controversy, and that it did not attempt to interfere with criminal proceedings, because none had been commenced, and none were pending. It was also urged that the Attorney-General had submitted to the jurisdiction and could not, in good conscience, raise the question after the testimony had all been taken. The court dismissed this phase of the controversy in the following language: (l. c. 114.)

> "Without expressing any opinion as to the jurisdiction of the court, if it had been properly and seasonably challenged, we think the true solution of this matter will be found in reversing the decree upon the merits, and directing a dismissal of the suit as to the Attorney-General without prejudice as to any other suit or action."

In the decision in the Missouri, Kansas & Texas Railroad Company vs. Missouri Railroad Commissioners, 183 U. S. 53, decided at the same term of court at which the decision in Cotting vs. Goddard was rendered, the court decided that the suit instituted by the Board of Railroad Commissioners of the State of Missouri against the Missouri, Kansas & Texas Railroad Company to compel it to comply with an order directing the railroad to discontinue certain charges that it was making for travel over what is known as the Boonville Bridge, was

subject to removal to the United States Circuit Court. The contention that the suit was in fact a suit by the State was denied upon the ground that the State "as an artificial person" had no interest in the controversy. The Reagan case was cited in support of that contention, and this was the only question which was considered and decided. The case of Fitts vs. McGhee was not mentioned in the decision. Without discussing the question as to whether that case could not have been decided otherwise, more consistent with previous adjudications of this court, it is plainly evident that it is readily distinguishable from the facts presented by the case of Fitts vs. McGhee and the facts in the case at bar, and is not to be considered as overruling or modifying the decision in Fitts v. McGhee.

The case of Prout vs. Starr, 188 U. S. 537, is relied upon in this controversy as sustaining the jurisdiction of the United States Circuit Court. That case was a sequel to Smyth vs. Ames, and is of importance in that it places a construction upon the previous decision in so far as it undertakes to enjoin the Attorney-General from performing the general duties imposed upon him by the Constitution and laws of that State. The court said, l. c. 544:

> "It is further argued by the appellant as one of the grounds of his demurrer that he was complained against in his official capacity as Attorney-General of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the Attorney-General of a State cannot be restrained by an injunction of the United States Court from enforcing the criminal laws of a state. This, we think, is only another phase of the same quetsion. It is true that the defendant was included in the bill as the Attorney-General of the State, but that was because he was one of the board of transportation *which was directed*

> *to enforce the provisions of the act.* The bill did not seek to interfere with the acts of the Attorney-General in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood."

Following this construction of the real force and meaning of the decision in Smyth vs. Ames, the court announced the controlling principle which sustained the injunction asked for in that case in the following language:

> "Several changes of incumbents in the office of Attorney-General took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted, and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal court to the State court by filing a bill in the latter. Such a course might bring about a conflict between those courts and create the confusion so often deprecated by this court."

The application of the principles announced in Fitts vs. McGhee to the facts of that case were not considered, but the decision in Fitts vs. McGhee was expressly affirmed in the following language, l. c. 543:

> "* * * the judicial power of the United States has not infrequently been exercised in securing to the several states, in proper cases, the immunity intend-

ed by the eleventh amendment. Hans. vs. Louisiana, 134 U. S. 1, 10; North Carolina vs. Semple, 134 U. S. 22; Harkrader vs. Wadley, 172 U. S. 148; Fitts vs. McGhee, 172 U. S. 516.

It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union, that each and all of them shall be respected and observed."

Thus, it is at once apparent that this decision, instead of overruling the decision in Fitts vs. McGhee, or in any way modifying the principles therein announced, must be construed as expressly affirming the same.

In the case of Barney vs. New York, 193 U. S. 430, it was decided that the act sought to be enjoined in that case was not the action of the State and, therefore, no ground of federal jurisdiction existed. The court said, in reference to suits against the State, l. c. 439:

"There are many cases in this court involving the application of the eleventh amendment which draw the distinction between acts of public officers *virtute officii* and their acts without lawful right, *colore officii;* and in Pennoyer vs. McConnaughy, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be, those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in Tindall vs. Wesley, 167 U. S. 204, and Fitts vs. McGhee, 172 U. S. 516."

In the case of Gunter vs. Atlantic Coast Line Railway, 200 U. S. 273, some of the questions involved in this controversy and in the decisions previously rendered were discussed

by the court. The jurisdiction in that case was sustained, and the application of the eleventh amendment denied upon the grounds: First, a suit against State officers to enjoin them from enforcing a tax due the State or alleged to be in violation of the Constitution of the United States, is not a suit against a state within the meaning of the eleventh amendment; second, the State may voluntarily waive the question of jurisdiction and submit itself to the decision of the court, and it was held that in that case the State of South Carolina had so acted; third, that after the State had submitted itself to the jurisdiction of the court, when it might have claimed an exemption under the provisions of the eleventh amendment, it could not in a proceeding ancillary to such litigation interpose the eleventh amendment to defeat the jurisdiction. Without considering the question as to whether the ground upon which this jurisdiction was based was or was not in conflict with the decision In re. Ayres, 123, U. S. 443, it is manifest that it denies the correctness of the test applied in the Reagan case for determining what suits are and what are not within the prohibition of the Eleventh Amendment. For, it is manifest that in the collection of a tax due to the State, the State is "pecuniarily interested" as a political corporation, separate and distinct from its interest in a governmental capacity.

The decision in Fitts v. McGhee was urged by the Attorney-General in the Gunter case in defense of the suit. The court said, in reference to that contention, l. c. 291:

> "It is insisted that the court below had no power to restrain the Attorney-General of South Carolina and the counsel associated with him from prosecuting in the State courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the

> Eleventh Amendment and the provisions of Section 720 of the Revised Statutes. * * * * The soundness of the doctrine relied upon is undoubted. In re. Ayres, 123 U. S. 443; Fitts vs. McGhee, 172 U. S. 516. The difficulty is that the doctrine is inapplicable to this case."

Consequently, it is clear that if the court does not doubt the correctness of the doctrine that the Attorney-General of a state cannot be enjoined "from prosecuting in the State courts actions, authorized by the laws of the State," that the Attorney-General of Minnesota cannot be held subject to contempt of court in that he has undertaken to prosecute in the courts of that state an action which he was authorized to begin, and prosecute under the Constitution and laws of the State of Minnesota.

While the cases heretofore discussed have been cited in subsequent decisions by the court, there has been no discussion of the distinctions made between the decisions in Smythe vs. Ames, and the Reagan case on the one hand, and Fitts vs. McGhee on the other, and nothing said in any of those cases is subject to the construction of modifying in any way the principles announced in the case of Fitts vs. McGhee. Consequently, it is apparent that that decision must be regarded as a controlling authority in this case, for the reason that there is no distinction between the facts presented by the two cases and the principles of law applicable thereto. In each case an injunction was asked against the chief law officer of the State, from proceeding by formal judicial proceedings in the courts of a state to enforce the laws of a state; the Attorney-General of neither state was specially charged to enforce the provisions of the act in question and in any suit that he might institute for that purpose he would act as a result of an executive discretion conferred upon him by the Constitution and

laws of the State; in each case, the statute that was sought to be enjoined, was a criminal statute which the state had a right to enact as a regulation of intra-state commerce; in each case an injunction was prayed for upon the ground that the act of the state was void because in violation of certain provisions of the Federal Constitution.

SUITS AGAINST THE UNITED STATES.

The question involved in this case as to when a suit is a suit against a state has been considered by this court in cases instituted against officers of the United States, and it has been held "that the question whether a particular suit is one against the state within the meaning of the Constitution must depend upon the same principles that determine whether a particular suit is one against the United States."

Tindal vs. Wesley, 167 U. S. 216.

A leading case upon this subject is the case of United States vs. Lee, 195 U. S. 196, in which it was held in a suit against individuals who claimed under executive and legislative authority to hold land belonging to the United States that they were not exempt from an action to recover the possession of the property by reason of the plea that the suit was in effect, a suit against the United States. The decision goes upon the theory that the defendants were personal trespassers, and upon the further theory that the effect of the judgment would not be to conclude the claim of the United States to the property in question. An investigation of the subsequent decisions of this court in cases in which it is claimed that a suit against an officer of the United States was in effect, a suit against the United States, show that the principles by which this question is to be answered, have been established, as follows:

First: A suit against an officer of the United States is

a suit against the United States if the latter is the real party in interest: Second, whether the United States is the real party in interest is to be determined by the effect of the judgment or decree asked: Third, a suit in which it is sought to secure the performance by an executive officer of a plain ministerial duty in which he would be required to exercise no discretion, is not a suit against the United States.

In Belknap vs. Schild, 161 U. S. 10, the owner of a patent, sought to enjoin the United States from the use of the same, and for damages therefor. The court quotes with approval the statement of Mr. Justice Field, in United States vs. Clark, 8 Pet. 444, as to the exemption of a sovereign from suit:

> "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy, the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings, at law or in equity, without their consent."

After an extensive review of the decisions as to the exemption of the United States, and the several states from suits against their officers, the court applies the following principles in ordering the dismissal of the bill:

"Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare."

From this decision, Mr. Justice Harlan, with whom Mr. Justice Field concurred, dissented on the ground that United States vs. Lee was a controlling authority to the contrary. Mr. Justice Peckham took no part in the decision.

In Minnesota vs. Hitchcock, 185 U. S. 373, it was held that the United States had by an act of Congress consented to the suit against the Secretary of the Interior. But in the discussion of the question as to what is, and what is not a suit against a state, or the United States, the court quotes with approval the doctrine announced in In re. Ayres, to the effect that a suit against a state is prohibited by the eleventh amendment "when the state, though not named, is the real party against which the relief is asked, and the judgment will operate," the court adding by way of explanation, however, "of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in

appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform."

In International Postal Supply Company vs. Bruce, 194 U. S. 601, this court in a decision written by Mr. Justice Holmes, from which Mr. Justice Harlan and Mr. Justice Peckham dissented, answered in the negative a question certified from the Circuit Court of Appeals, involving the question of the right of a complainant to the cancellation of a lease by a bill in equity against the postmaster at Syracuse, New York. The decision was based upon the decision in Belknap vs. Schild, of which case it was said:

> "Of course, if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States."

This construction of the former decision, as applied to that case emphasizes the test heretofore suggested that it is the effect of the judgment or decree which determines whether the suit is or is not against the sovereign.

And in Oregon vs. Hitchcock, 202 U. S. 60, the court, in an opinion written by Mr. Justice Brewer, reaffirms the same principle of distinction in the statement, l. c. 69:

> "The question, whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

DECISIONS BY CIRCUIT COURTS, CONSTRUING AND APPLYING THE 11TH AMENDMENT.

It is not without interest and profit in the consideration of this case to note the manner in which the decisions of this court in the cases reviewed have been construed by the United

States Circuit Courts in cases involving the same question as the case at bar.

The cases in which this question has arisen have recognized the doctrine announced in Fitts vs. McGhee, and the principles declared in the cases last above referred to.

In Farmers' National Bank vs. Jones, 105 Fed. Rep., in an opinion written by Caldwell, circuit judge, a bill in equity was dismissed which asked for a mandatory injunction against the State Debt Board of Arkansas to compel it to issue certain bonds in accordance with an act of the Legislature of that state. The decision denies the relief asked upon the grounds that its effect would be to coerce the action of a state, and that the acts sought to have performed were not "purely ministerial" in their nature.

In Arbuckle vs. Blackburn, Dairy and Food Commissioner of Ohio, 113 Federal Reporter, 616, in an opinion, written by Day, Circuit Judge, and concurred in by Lurton and Wanty, District Judges, a comprehensive discussion is to be found of the principles applicable to the case at bar. In that case it was sought to enjoin the Food Commissioner of the State of Ohio, on the ground that under his enforcement and construction of a law of that State, the property rights of the plaintiff, as secured by the Constitution of the United States, were violated. The court denied the injunction upon the authority of In Re. Ayres, Harkrader vs. Wadley, 172 U. S. 148, and Fitts vs. McGhee. And in reference to the question as to whether the suit was prohibited by the eleventh amendment, the court said:

> "Upon the authority of this case and others decided in the Supreme Court, it seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution, withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against

one of the United States by citizens of another state, or citizens or subjects of any foreign state * * * The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the state. By the terms of the statute, the dairy and food commissioner is an officer of the state, expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink or drugs, and unlawful labeling in the State of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of or contrary to any laws of the State of Ohio. * * * What, then, is the object of the injunction sought in this case? It is no more nor no less than to restrain the officer of the state from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed—by bringing criminal prosecutions in the name of the state. This is virtually to enjoin the state from proceeding through its duly qualified and acting officers."

In Union Trust Company vs. Stearns, et al., 119 Federal Reporter, 790, Colt, circuit judge, denied an injunction against the Attorney-General of Rhode Island and prosecuting attorney, asking that they be enjoined from instituting any proceeding to enforce a law regulating the operation of street Railroads, on the authority of In re. Ayres, and Fitts vs. McGhee. The decision is based upon the fact that the injunction asked would, in effect, restrain the state, as it can act only through its properly selected officers; that the officers against

whom the injunction was asked, were charged with no special duty as to the enforcement of the law and bore no different relation to it than to any other penal statute of the state; and also on the ground that the suit sought to enjoin the enforcement of a criminal statute. The different decisions of this court were reviewed and the principles announced therein clearly declared.

In Morenci Copper Co. vs. Freer, 127 Federal Reporter, 199, an injunction was denied which sought to restrain the Attorney-General of West Virginia from instituting an action in quo warranto, to forfeit the charter of the Copper Company, on the ground that it had failed to comply with the corporation tax law of that State. The decision was based upon In re. Ayres, and Fitts vs. McGhee, the court holding that as the suit sought to prevent the Attorney-General from proceeding in the name of the State, the suit was in fact against the State.

In the recent well considered case of Western Union Telegraph Company vs. Andrews, 154 Federal Reporter, 95, Trieber, district judge, makes an extensive review of the authorities bearing upon the questions presented in this case, and undertakes a classification of cases which are, and which are not to be regarded as suit against a state. The relief asked for in that case, which was denied, was an injunction to restrain the prosecuting attorneys of the State of Arkansas from instituting penalty suits against the Western Union Telegraph Company for its failure to comply with the laws of that state. It was claimed that the act under which the penalties were sought to be enforced was in violation of the Federal Constitution. The court in its decision made the following classification as to what suits are, and what are not within the meaning of the eleventh amendment:

> "(a) No suit can be maintained in the courts of the United States against the officers of a state when the state, though not named in the pleadings, is the

real party against which the relief is asked and the judgment will operate.

(b) If an individual, although he be an officer and claims under a statute of the state, which statute is unconstitutional, holds possession or is about to take possession of, or to commit any trespass upon, property belonging to or in possession of the plaintiff, he cannot resist the judicial determination in a suit against him of the question of the right of such possession or threatened trespass by simply asserting that he held, and was entitled to hold or seize the property in his capacity as an officer of the state, and for this reason the suit is one against the state.

(c) The exemption of the state from judicial process does not protect its officers and agents from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the state, and when the remedy at law is inadequate, its officers may be restrained by injunction from doing positive acts for which they would be personally liable for taking or injuring plaintiff's property in violation of the Constitution or laws of the United States.

(d) It may be safely held that the state is the real party when the relief sought, is that which inures to it alone, or when the action will have the effect of depriving the state of funds or property in its possession.

(e) The fact that the state has a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large is not that which makes the state as the organized political community a party in the interest to the litigation. The interest must be one in the state as an artificial person, as distinguished

from that of a government for the benefit of its citizens.

(f) The fact that the state voluntarily assumes the defense in the cause or litigation does not make it the real party. This is simply an incidental matter, and does not determine its relation to the suit.

(g) That an action to prevent the enforcement of a tariff which is unreasonable and confiscatory, and which is to be enforced by a commission or other officials who are merely acting as administrative agents for the state, is not one against the state, if the act itself is unconstitutional and void as against the complainant.

(h) A proceeding against officers of a state merely to test the constutionality of a state statute in the enforcement of which the officers will act only by formal judicial proceedings in the courts of the state, as attorneys for the state, is in effect a suit against the state."

By this review of the decisions of the Supreme Court and the United States Circuit Courts, it is submitted that the principles announced in Fitts vs. McGhee, can in no wise be regarded as overruled or modified, and that they have become thoroughly established in the law regulating the relations between the National Government and the several states. Under the principles announced in these decisions, the petitioner is clearly entitled to his discharge.

THE CONTROLLING PRINCIPLES IN DETERMINING WHEN A SUIT IS AGAINST A STATE.

It remains only to consider some of the controlling principles announced by other decisions of the Supreme Court of the United States to demonstrate the correctness of this con-

tention. These cases to which we will now invite the attention of the court, establish the following propositions to be true:

First: When an officer of a state proceeds to enforce a state law or to collect a demand due to a state, by formal judicial proceedings instituted in the exercise of his executive discretion in the courts of a state, he is in such proceedings representing the state's action and liability; his act is the act of the state. It necessarily follows, therefore, that the jurisdiction of the United States Circuit Court does not permit a suit in equity to restrain him from instituting such a suit.

Second: A state can act, in the enforcement of its laws in its own courts, only through its properly selected and authorized agents and officers. When it is sought to enjoin a state officer, as such, from instituting such a suit, an injunction is in effect asked for against a state proceeding in the only way in which it can proceed to secure an observance of its laws.

Third: The fourteenth amendment prohibits a state from denying to anyone the equal protection of its law, or depriving him of his property without due process of law. When an injunction is asked to restrain the Attorney-General of a state from instituting in the name of the state, a suit in the state courts to enforce a state law, the basis of the claim of Federal jurisdiction is, that the action of the Attorney-General in this regard is the action of the state. The jurisdiction is asserted on the ground that the action sought to be enjoined is the action of the state, otherwise that which would be sought to be enjoined would not be prohibited by the fourteenth amendment.

Barney vs. New York, 193 U. S. 430.

In answer to this contention, the State asserts its immunity from suit under the provisions of the eleventh amendment.

The inconsistency of the claim that a state is violating the provisions of the fourteenth amendment, when its Attorney-General institutes a suit in its name in the state courts to enforce a state law, and yet is not protected from an injunction against such action by the provisions of the eleventh amendment, is at once apparent. The same inconsistency exists if the Federal jurisdiction is asserted, on the ground that the act sought to be enjoined is in violation of the contract or commerce clause of the Constitution. In each case jurisdiction is asserted, because it is claimed that the state is about to violate the provisions of the Constitution of the United States. In each case when the eleventh amendment is interposed as a denial of the jurisdiction, it is contended that the suit is not against the State. It is contended in one breath, that rights under the Federal Constitution are about to be violated by a state, and in the next that an injunction against a state is not asked for when it is sought to have such acts enjoined. The jurisdiction is asserted on the ground that the State has violated the fourteenth amendment. The application of the eleventh amendment is denied on the theory that it is not the State's action against which the injunction is prayed.

If the eleventh amendment had never been enacted, and it was sought to restrain a state by a bill in equity from instituting proceedings in its own court, it would be necessary that both the mesne and final process should operate against the State through its chief law officer, the Attorney-General. As is said by Mr. Justice Mathews, in Hagood vs. Southern, 117 U. S. 52, l. c. 69:

> "If the state is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained or enforced, except as the public conduct and government of the ideal political body,

> called the state, could be reached and effected through its official representatives. A judgment against these latter in their official and representative capacity, commanding them to perform official functions on behalf of the state, according to the dictates of the court, is, if anything can be, a judicial proceeding against the state itself. If not, it might well be asked what would constitute such a proceeding?"

And the same proposition was succinctly stated by the Chief Justice, in Louisiana vs. Jumel, 107 U. S. 711:

> "They (officers of a state) can be moved through the state, but not the state through them."

A clear line of distinction to be noted in determining what is and what is not a suit against a state is manifest, from the fact that when it is sought to coerce the action of a state, the proceeding must be directed against an officer of the state in his official capacity. As was said by Mr. Justice Miller, in Cunningham vs. Railroad, 109 U. S. 446:

> "In these cases (which are not prohibited by the eleventh amendment) he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction, because he asserts authority as such officer."

And the same principle was stated by Chief Justice Marshall, in Governor of Georgia vs. Madrazo, 30 Pet. 110:

> "Where the chief magistrate of a state is sued, not by his name, but by his title of office, and the claim made upon him is entirely in his official character,

> we think the state itself may be considered a party to the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant."

And again, in In re Ayres, 123 U. S., l. c. 497, the Court said, in speaking of the object and purpose of the bill:

> "It does not charge against them, in their individual character, anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties.
>
> The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virgina in its own name, and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney-General, according to the precedents in such cases. * * * *
>
> The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are presonally subjected

> to the process of the court so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

Mr. Young, as an individual, is in no sense a party to this action. He has no interest in the controversy. The complainants in the United States Circuit Court sought no relief against him, except as they sought to prevent him from acting in an official capacity. And when he acted in an official capacity by instituting a formal judicial proceeding in the courts of Minnesota, it was the only way the state of Minnesota could act in the institution of a suit in its own courts. In fact, if the threatened action of the Attorney-General in instituting a suit in the Minnesota courts to compel the railroad company to comply with the act of the Minnesota Legislature was not the action of the state, then no Federal question was involved under the allegations of the bill.

Barney vs. City of New York, 193 U. S. 430.

Again, does the language of the Ayres case apply forcibly to the facts presented by this case, l. c. 503:

> "The acts alleged in the bill, as threatened by the defendants, are violations of the assumed contract between the State of Virginia and the complainant, *only as they are considered to be the acts of the state of Virginia.* The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. * * * In a certain sense and in a certain way, the Constitution of the United States protects contracts against laws of a state subsequently passed impairing their obligation, and this

provision is recognized as extending to contracts between individuals and the state; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the eleventh amendment, which secures to the state an immunity from suit."

Quoting from Carter vs. Greenhow, 114 U. S. 317, the Court continues, l. c. 504:

"'How, and in what sense are these rights secured by the Constitution of the United States' The answer is, by the provisions of article I, section 10, which forbids any state to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the Legislature of a state, they are unconstitutional and void.' * * * But where the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants, which when done, would constitute a performance by the state, or forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution.

It cannot be doubted that the 11th amendment to the Constitution operates to create an important

> distinction between contracts of the state with individuals and contracts between individual parties. * * * In respect to these (contracts between a state and an individual) by virtue of the 11th amendment to the Constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion."

All that is said as to the effect of the contract clause of the Constitution, applies with equal force to the fourteenth amendment. While no state is by the fourteenth amendment permitted to deprive one of his property without due process of law, this does not mean that a state can be restrained from such action by a suit against it in the United States court any more than it can be restrained from violating its contract or made to comply with its contract in a suit in the United State Circuit Court. All the safeguards accorded to individuals by the Federal Constitution against wrongs or usurpations by a state, can be invoked in the courts of the state. And if not recognized by the courts of the state, their action is subject to review, by writ of error, in the Supreme Court of the United States. Unless the court is willing to go to the extent of holding that the fourteenth amendment places a restriction upon a state, different in kind from that imposed by article I, section 10, or that it modifies or repeals the eleventh amendment, then a state is no more subject to suit for violating the fourteenth amendment than it is for violating the contract clause of the Federal Constitution.

THE RAILROAD COMPANY AND ITS STOCKHOLDERS WILL BE ACCORDED DUE PROCESS OF LAW IN THE SUIT INSTITUTED BY THE ATTORNEY-GENERAL OF MINNESOTA.

The force of this argument can be more clearly understood by analyzing the bill in equity in the United States Circuit Court by the stockholders of the Northern Pacific Railroad, for the purpose of ascertaining the real basis of their complaint. Their contention that the act of the Minnesota Legislature and the threatened suit of the Attorney-General of that state to enforce it, are in violation of the commerce clause of the Constitution, is so plainly without warrant of authority to support it that it can be practically disregarded. In reference to this act, it can be said, as was said by Mr. Justice Shiras, in Louisville & Nashville Railroad Company vs. Kentucky, 183 U. S. 503, l. c. 518, referring to an act of the state of Kentucky, which was alleged to be an interference with interstate commerce:

> "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State. * * * * * *
>
> It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally, but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general movement to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State."
>
> Smyth vs. Ames, 169 U. S. 466.
>
> L. & N. R. R. Co. vs. Kentucky, 161 U. S. 677.

The real basis of complainant's suit is that the Attorney-General of Minnesota be enjoined from instituting any suit in the courts of Minnesota to compel the Northern Pacific Railroad Company to comply with the act of April 18, 1907, on the ground that the State of Minnesota would be thereby depriving them of their property "without due process of law." How could the institution of a suit by the State of Minnesota, through its chief law officer, in its own courts, to compel a railroad company to obey its laws, deprive the railroad company or its stockholders of property without due process of law? The action itself would accord to the railroad company and its stockholders due process of law. When the railroad company asked for and was grated a license to do business in Minnesota, it agreed to comply with all laws that the State might enact regulating the charges for its intra-state traffic, so as to give to it a fair return upon the value of its property. The privilege was "taken and held subject to the power of the State to regulate and control the grant in the interests of the public."

L. & N. R. R. Co. vs. Kenucky, 183 U. S. 517.

The suit instituted by the State of Minnesota, through its Attorney-General, was for the purpose of determining the question as to whether the act of April 18, 1907, was a proper exercise of this police power of the State. All of the evidence and all the principles of law that the stockholders and the railroad company could avail themselves of to sustain the suit in the United States Circuit Court, they could use to defeat the action of the State in the State court. The courts of Minnesota are under double obligation, imposed by the Constitution of Minnesota and the Constitution of the United States, to see that the railroad company is not deprived of its property without due process of law. If the trial court should fail to protect the constitutional immunities invoked by the railroad and its stock-

holders, they can prosecute their appeal to the Supreme Court of Minnesota, and if they feel aggrieved by the decision of that court, they can, by writ of error, secure the judgment of this court as to whether the safeguards of the Federal Constitution against injustice by the State of Minnesota have been violated. Surely such procedure, even if it resulted in a decision requiring the railroad company to obey the act of the Minnesota Legislature, would not result in depriving the stockholders of the railroad company of their property without due process of law.

When thus analyzed, this case clearly separates itself from those in which this court has held that officers of a State could be enjoined from committing a trespass upon the property of a citizen when acting under a void or pretended authority of a State. It is clearly distinguishable from that class of cases in which it has been held that the State was not subjected to a suit when one of its officers was compelled to perform a purely ministerial duty.

CONCLUSION.

As was said at the beginning of this argument, all that is to be said upon this question has been said, and well said, many times before. There are certain cases against officers of a State that all can agree are not suits against a State within the meaning of the Eleventh Amendment. There are certain cases against officers of a State that all can agree are within the provisions of the Eleventh Amendment. There are others still that are difficult to place, because it is difficult to tell whether the action sought to be enforced or restrained is the "State's action and liability," or whether it is the action and liability of individuals masquerading under the pretended authority of a State. There is a time when all can agree that it is day, and there is a time when all can agree that it is night. But there is a time when it is difficult to say whether it is day or whether it is night. This case presents some new and interesting aspects of this controversy as to the

immunity of the several States from suit. This court, and no inferior Federal Court has heretofore declined to enjoin the members of the Railroad Commission of a State from enforcing a schedule of maximum railroad rates on the plea that their enforcement would deprive the complainants of their property without due process of law. This Court, and no Federal Court, prior to the decision of the Judge of the United States Circuit Court for the Third District of Minnesota, ever granted an injunction restraining the chief law officer of a State from the institution in the courts of his State, as a result of his executive discretion and under his general authority as chief law officer of the State, a suit to compel obedience to the laws of his State.

The sovereignty belonging to the several States under our system of government, which they did not surrender by becoming parties to the Federal compact, includes the right to institute suits in their own courts and the right not to be sued in the Federal courts. The right to sue by civil or criminal process to enforce obedience to or impose punishment for a violation of law is not only an attribute of sovereignty—it is one of the highest attributes of sovereignty. This attribute of the sovereignty of a state can be exercised only through its chief or subordinate law officers. The Attorney-General of the State is the only person who could sue in the name of the State in its own courts by mandamus to compel a railroad company to comply with its *contract with the State.*

The basis of the action in mandamus is to compel the railroad company to comply with its public duty to obey the constitutional enactments of the State of Minnesota. The Attorney-General is the only officer of the State who, in its name and on its behalf, could sue in the courts of the State to forfeit the license of the railroad company for its failure to comply with its contract with the State. If a State can exercise this attribute of sovereignty only through its Attorney-General, how can it be reasonably said that such a suit is not "the State's action?" If it is the State's action, how can it be enjoined without violating the Eleventh

Amendment to the Federal Constitution? If the people of the several States in 1798 had been advised that the States were not protected by the adoption of the Eleventh Amendment in their right to institute suits in their own courts to enforce the observance of their own laws, how impotent and ineffective would this amendment have seemed for the accomplishment of the purposes thereby sought to be effected. To deny this right to the State deprives them of one of the most important and essential attributes of sovereignty. It reduces them to a condition of tutelage under the direction and control of the inferior United States courts, to which would thus be given a practical veto power upon the acts of their legislative departments, and a general supervision and control over the representatives of the executive department in the performance of their official duties. Such a result would disorganize the harmony of our system of government and reduce to an irreducible minimum the sovereignty of the States.

Respectfully submitted,

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